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**IN THE
Supreme Court of the United States**

October Term, 1977

No. ~~77~~-1450

OTTO T. BANG, JR., et al.,

Appellants,

vs.

HAROLD CHASE, et al.,

Appellees.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA**

JURISDICTIONAL STATEMENT

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April, 1978

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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JURISDICTIONAL STATEMENT

Appellants¹ appeal from a memorandum order and judgment of a three-judge court of the United States District Court for the District of Minnesota which refused to issue an injunction against challenged provisions of Minnesota's election campaign financing law. This Statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

¹Appellants are Otto T. Bang, Jr., Nancy Brataas, William G. Kirchner, Charles Berg, Gerald Knickerbocker, Ray O. Pleasant, Arne H. Carlson, Gary W. Laidig, and Selma Stenberg. Appellees are Harold Chase, Elizabeth Ebbott, David Durenberger, Spencer Sokolowski, Roger F. Noreen, Constance Burchette, Jim Lord, Arthur C. Roemer, and Gary W. Flakne.

OPINION BELOW

The memorandum order of the United States District Court for the District of Minnesota is reported at 442 F. Supp. 758 and is set forth in Appendix A to this Statement.

JURISDICTION

This action was commenced by appellants under the Civil Rights Act of 1871, 42 U.S.C. §1983, and its jurisdictional counterpart, 28 U.S.C. §1343, challenging the constitutionality of several provisions of the Minnesota Ethics in Government Act, Minn. Stat. §§10A.01-.34 (1976) (amended 1978). Both injunctive and declaratory relief were sought. A three-judge district court was convened pursuant to 28 U.S.C. §§2281, 2282² and on December 14, 1977, issued a memorandum order. While the order, and the judgment entered the same day, held several sections of that Act unconstitutional and enjoined their enforcement, the constitutionality of other challenged provisions was sustained and injunctive relief as to them denied. Appellants filed their notice of appeal in the district court on February 10, 1978. Appellees³ filed a notice of cross-appeal on February 13, 1978. The Court's jurisdiction over the appeal is conferred by 28 U.S.C. §1253.

²Although section 2281 was repealed by Pub. L. 94-381, 90 Stat. 1119 (1976), the repeal did not affect actions which were already pending.

³Except for defendant Gary Flakne, all defendants appealed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the United States Constitution and the relevant provisions of the Minnesota Ethics in Government Act, Minn. Stat. §§10A.30-.33 (1976) including 1978 amendments of those sections, are reproduced in Appendix B to this statement.

QUESTIONS PRESENTED

Do the provisions for public financing of campaigns for election to Minnesota offices by means of party-designated tax return check-offs which have resulted in large funding disparities between candidates violate the rights of one or more of the plaintiffs to freedom of speech, freedom of association, equal protection of the laws, or due process of law under the First and Fourteenth Amendments to the Constitution of the United States?

STATEMENT OF THE CASE

This action was commenced August 2, 1976, raising federal constitutional challenges to several provisions of the Minnesota statutes which provide for public funding and regulation of campaigns for election to state office. Among the statutes challenged were those creating a scheme for dispensing state money to candidates of political parties by means of party preferences expressed by taxpayers on their state income tax returns.⁴ Minn. Stat.

⁴Also challenged were restrictions on the amount of expenditures that could be made by non-candidates, Minn. Stat. §10A.27, subd. 1, a prohibition on expenditures over \$20 by non-candidates in support of a candidate without the candidate's prior written authorization, Minn. Stat. §10A.17, subd. 2, and a requirement that a non-candidate making expenditures on behalf of a candidate without written author-

§§10A.30-33. Plaintiffs alleged the Minnesota system for public financing of election campaigns invidiously discriminated against them and violated their rights to freedom of association, freedom of speech, equal protection of the laws, and due process of law under the First and Fourteenth Amendments. They sought a declaratory judgment that the scheme was unconstitutional and an injunction restraining its operation.

Plaintiffs were eight incumbent members of the Minnesota legislature who were candidates for re-election in the 1976 general election⁵ and two citizens, Selma Stenberg and John Heegaard.⁶ Defendants were the members of the State Ethical Practices Board,⁷ the Treasurer of the State of Minnesota,⁸ the Commissioner of the Minnesota Department of Revenue,⁹ and the Hennepin County Attorney.¹⁰

Sections 10A.30 to 10A.33 establish a scheme for public financing of campaigns for election to state offices¹¹ by means of party-designated income tax return check-offs. The State Elections Campaign Fund, hereinafter re-

ization disclose his lack of authorization within any communication. Minn. Stat. §10A.17, subd. 5. The lower court held unconstitutional the limits on expenditures by non-candidates and the prior-written-authorization condition on expenditures and enjoined their enforcement. The requirement of section 10A.17, subd. 5 that persons making expenditures on behalf of a candidate without written authorization disclose that lack of authorization was upheld. Appellants do not seek review of that decision.

⁵Plaintiffs Bang, Brataas, Berg, and Kirchner were members of the Minnesota Senate. Plaintiffs Knickerbocker, Pleasant, Carlson, and Laidig were members of the Minnesota House of Representatives.

⁶Plaintiff Heegaard has not appealed and is deceased.

⁷Harold Chase, Elizabeth Ebbott, David Durenberger, Spencer Sokolowski, Roger F. Noreen, and Constance Burchette.

⁸Jim Lord.

⁹Arthur C. Roemer.

¹⁰Gary Flakne.

¹¹The Minnesota offices made subject to the Act are Governor, Lieutenant Governor, Attorney General, Treasurer, Auditor, Secretary of State, Senator, and Representative.

ferred to as the Fund, is created within the general fund of the state treasury. §10A.30, subd. 1. Separate accounts are maintained within the Fund for each of the political parties and a general account is established within the Fund for non-party designated monies. §10A.30, subd. 2. Effective with taxable years beginning after December 31, 1973, every individual whose Minnesota income tax liability, after personal credits, is one dollar or more may designate that one dollar be paid into the Fund. §10A.31, subd. 1. In the case of a joint return with a husband and wife having an income tax liability of two dollars or more, each spouse can designate that one dollar be paid into the Fund. The check-off designation does not directly affect the tax liability of the taxpayer. It is simply a direction to expend state funds consistent with the designation.

The amounts designated by taxpayers to the various accounts within the Fund for taxable year 1974, and the estimates of the Commissioner for taxable year 1975, are as follows:

State Elections Campaign Fund			
Account	1974 Actual	1975 Estimate	Total
Democratic-Farmer-Labor	\$175,259.	\$187,354	\$362,613
Independent-Republican	68,395	99,188	167,583
American Communist	1,451	1,500	2,951
Industrial Government	187	132	319
Libertarian	79	88	167
Socialist Workers	406	617	1,023
General Fund	1,365	1,190	2,555
TOTAL	123,169	150,765	275,934
	372,311	\$440,834	\$813,145

For tax years 1974 and 1975, 30 percent of the monies in each account within the Fund was allocated to candidates for the Minnesota Senate and 30 percent to candidates for the House of Representatives. §10A.31, subd. 5(e). All

party-affiliated candidates whose names were to appear on the general election ballot shared equally in the monies allocated to their respective offices from their party account. §10A.31, subd. 5(f).

Monies from each party account are paid by the Treasurer to the candidates of that party within two weeks after certification of the results of the primary election.¹² §10A.31, subd. 6. Within two weeks after certification of the results of the general election, the available monies in the general account are distributed by the Treasurer to all candidates who received at least 10 percent of the votes cast for the office for which they ran without regard to party affiliation or lack thereof. §10A.31, subd. 7.

In 1976 there were two major political parties in Minnesota as defined in the relevant statutes:¹³ Independent-Republican (hereinafter referred to as I-R) and Democratic-Farmer-Labor (hereinafter referred to as DFL). Plaintiffs Bang, Brataas, Kirchner, Knickerbocker, Pleasant, Carlson, and Laidig were designated as I-R party candidates on the 1976 general election ballots. They were each opposed by a candidate of the DFL party. Plaintiff Senate candidates Bang, Brataas and Kirchner received approximately \$838 from the I-R party account in the Fund shortly after the primary election in October, 1976. Their DFL opponents received approximately \$1,674 from the DFL party account. Plaintiff House candidates Knickerbocker, Pleasant, Carlson, and Laidig received ap-

¹²Primary elections are held on the first Tuesday after the second Monday in September preceding any general election. §202A.21. The state canvassing board meets on the second Tuesday after primary and general elections and is directed to certify the results "as soon as possible." §204A.53, subd. 2.

¹³§200.02, subd. 7; §10A.01, subd. 12.

proximately \$409 from the I-R party account.¹⁴ Their DFL opponents received approximately \$824 from the DFL party account. After the general election, each candidate for the legislature who received 10 percent of the vote for that office and had agreed to accept public funds, §10A.32, subd. 3, received from the general account approximately \$591, if a candidate for the Senate, or \$314, if a candidate for the House, without regard to party affiliation.

Plaintiff Berg was an independent candidate not affiliated with any political party. He thus received no funds from a party account. His DFL opponent for the office of state senator received approximately \$1,674 from the DFL party account shortly after the primary. Plaintiff Berg did not agree to accept any funds from the general account. See, §10A.32, subd. 3.

In the 1976 legislative session a bill doubling the amount of the check-off to two dollars per taxpaying spouse was passed by the Minnesota House of Representatives but was killed in a conference committee.

In the court below, plaintiffs moved for a preliminary injunction and summary judgment. Defendants filed motions for abstention or certification, for dismissal of plaintiffs Heegaard, Stenberg, and Berg, and for summary judgment. The parties filed a stipulation of facts. Oral argument was had before the three-judge district court on October 1, 1976.

On October 10, 1976, the court issued an order which, *inter alia*, denied a preliminary injunction restraining distribution of state funds to legislative candidates.

¹⁴The House candidates' funds are divided among 134 seats, while the Senate contains 67 members.

Fourteen months later, on December 14, 1977, the court issued a memorandum order upholding the party-designation tax check-off system of campaign funding. The court did find that the distribution of money from the state-wide party accounts in equal shares to all legislative candidates of a party under section 10A.31, subdivision 5(f) was unconstitutional and enjoined its operation. The court further ordered that unless a constitutional method for distribution was enacted by March 1, 1978, all monies credited to the party accounts for legislative candidates as of that date and thereafter must revert to the general fund of the state. Judgment was entered the same day.

Appellants filed their notice of appeal on February 10, 1978. Appellees filed a notice of cross-appeal on February 13, 1978. Thereafter, on February 27, 1978, the Minnesota legislature enacted amendments¹⁵ to the statute. The amendments did not alter the provisions which give rise to the discriminatory funding which is the subject of this appeal.

THE QUESTIONS ARE SUBSTANTIAL

The issues here are at the heart of the American political system. The question presented is whether incumbent office holders riding a wave of popularity can enlist the power of the public purse in the candidacies of their political party. In 1976¹⁶ the State of Minnesota paid the legislative candidates of the DFL party twice the amount it paid their Independent-Republican opponents in the

¹⁵Laws 1978, ch. 463. Relevant provisions are set forth in Appendix B.
¹⁶The occurrence of the 1976 elections while the case was under advisement by the court below does not moot the issues herein. *Mandel v. Bradley*, 432 U.S. 173, 175 n.1 (1977); *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974).

critical period before the general election. It paid nothing to independent candidates in that period.

In summary, appellants argue that unequal funding of major-party candidates classifies them as favored or not based solely on their party affiliation. The state penalizes candidates who chose to associate with the party which at the moment the check-off is exercised happens to be favored by fewer taxpayers, regardless of past or present voter support for those candidates. Statutes which affect the First Amendment right of political association must be subjected to strict judicial scrutiny and can survive review only if they are necessary to serve substantial legitimate state interests and do so in fact. The state has no lawful right to promote the interests or assist the candidates of one major party to the disadvantage of another. While the state has substantial governmental interests in the public financing of campaigns, those interests are not served by disparate financing. The subsidization by the state of political preference, regardless whether expressed by taxpayers, by voters at the last election, or by incumbent officeholders has no place in the American system of government. The Court permitted it vis-a-vis minor party candidates in *Buckley v. Valeo*, 424 U.S. 1 (1976), because the only practical alternative was no public campaign funding. Discriminatory funding operates to defeat the goals of cleansing the political system of improper influence and relieving serious candidates from the rigors of fundraising. Disfavored candidates find it necessary to raise money merely to overcome the advantage given their opponents by the state. The public's legitimate concern in reforming political spending can be served by non-discriminatory systems which do not penalize a candidate's

choice of political association. The use of taxpayer check-offs to determine the amounts candidates receive does not insulate its discriminatory effects from judicial review. Constitutionally impermissible legislative acts are not cured by the manner of their adoption, whether by state constitutional convention, by voter referendum, or by some taxpayer straw ballot.

The constitutional questions arising from the use of political preferences to determine the amount of public funding for candidates for public office are manifestly substantial. Those questions have not been previously presented to this Court. The public financing scheme for Presidential elections at issue in *Buckley* did not allow taxpayers to direct public money be paid to specific parties or candidates and treated major-party candidates equally. See, 424 U.S. at 91, 85-86 n.114, 88. Party-designated tax-check-off systems are in effect in six other states.¹⁷ Check-off schemes allowing party designation invariably result in the candidates associated with one major political party receiving an advantage over their opponents. Whether the state may constitutionally discriminate against the candidates of one major party in favor of the candidates of another is the critical question presented in this case.

1. Right of Political Association.

The Court has consistently recognized that the right of political association is deeply imbedded in the First

¹⁷See, Idaho Code §§ 34-2501 - 34-2505 (Cum. Supp. 1977); Iowa Code §§ 56.18-26 (Supp. 1977); Ky. Rev. Stat. §§ 118.015, 141.071-073 (Cum. Supp. 1976); Me. Rev. Stat. Tit. 36, §5283 (Supp. 1973); R.I. Gen. Laws §44-30-2(e) (Supp. 1977); Utah Code Ann. §§ 59-14A-99, 59-14A-100 (Supp. 1977). The check-off system formerly in effect in North Carolina expired on December 31, 1977. See N.C. Gen. Stat. §105-159.1 (Cum. Supp. 1977).

Amendment and entitled to full protection. See, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Elrod v. Burns*, 427 U.S. 347 (1976); *Buckley v. Valeo*, 424 U.S. at 25, 64-65; *Cousins v. Wigoda*, 419 U.S. 477 (1975); *Kusper v. Pontikes*, 414 U.S. 51 (1973); *Williams v. Rhodes*, 393 U.S. 23 (1968); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *NAACP v. Button*, 371 U.S. 415 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Bates v. Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958). Just as the Government may not forbid a candidate from associating with a political party, or require that he join a particular party, neither may it deny a candidate benefits because of his choice of political associations. In *Perry v. Sindeman*, 408 U.S. 593, 597 (1972), the Court said:

For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." *Speiser v. Randall*, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible.

Government actions which encroach upon the right of political association "cannot be justified by a mere showing of some legitimate governmental interest." *Buckley v.*

Valeo, 424 U.S. at 64. Rather, the "subordinating interests of the State must survive exacting scrutiny." *Id.* The state has no legitimate interest in penalizing or discriminating against persons or groups merely because of the content of their speech or philosophy. *Healy v. James*, 408 U.S. 169 (1972); *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972); *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago v. Mosley*, 408 U.S. at 95. Especially in the sensitive area of providing rules for the electoral process, the government must act in an even-handed manner. It may not choose sides. Moreover, if the governmental interest asserted is legitimate and substantial, the state must use the least drastic means of satisfying the interest. *Kusper v. Pontikes*, 414 U.S. at 61. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. at 438.

Here, I-R candidates for the state legislature received substantially less money from the state than their DFL opponents. Their disparate treatment stemmed solely from their association with the I-R party. Independent candidates were subjected to a greater disparity solely because of their decision not to associate with any party. A candidate's choice of party affiliation, if any, is protected by the First Amendment. The Minnesota election financing scheme penalizes and discriminates against candidates who choose a party which was less favored by participating taxpayers. A system which penalizes candidates because of their party affiliation must be given "exacting scrutiny." *Buckley*, 424 U.S. at 64.

2. Right to Vote.

Citizens have the right under the Equal Protection Clause to participate in the electoral process equally. See, *San Antonio School District v. Rodriguez*, 411 U.S. 1, 34 n.74, 59 n.2 (1973) (Stewart, J., concurring); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963). Invidious discrimination has been found not only where there is a relative dilution of the ability to participate, as in the reapportionment cases, but also where voter eligibility turns on economic status, *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), or on property ownership. *Hill v. Stone*, 421 U.S. 289 (1975); *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969). But see, *Salzer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973). See also, *Dunn v. Blumstein*, 405 U.S. 330 (1972).

It was recognized in the ballot access cases that unreasonable state restrictions on the ability of candidates to secure a place on the ballot burdens the constitutional rights of both the disfavored candidates and their supporters. *Lubin v. Panish*, 415 U.S. 709 (1974); *American Party of Texas v. White*, 415 U.S. 767 (1974); *Storer v. Brown*, 415 U.S. 724 (1974); *Bullock v. Carter*, 405 U.S. 134 (1972).

While the Court indicated in *Buckley* that in principle public financing schemes are "generally less restrictive of access to the electoral process than the ballot-access regulations" of those cases, 424 U.S. at 95, nevertheless it upheld the Presidential election financing system only after

finding that it was "in furtherance of sufficiently important governmental interests and has not unfairly or unnecessarily burdened the political opportunity of any party or candidate." *Id.* at 95-96. *Buckley* demonstrates that the Equal Protection Clause demands a closer examination of campaign financing schemes than that given government action not implicating the electoral process. *See, McGinnis v. Royster*, 410 U.S. 263, 270 (1973). Similarly, the Court has recognized that more intense equal protection scrutiny is required where First Amendment interests are involved. *See, Police Department of Chicago v. Mosley*.

It cannot be disputed that the Minnesota campaign funding scheme discriminates against some candidates and their supporters while favoring others. The resulting financial disadvantage impinges upon the political opportunity of the disfavored candidates. As the Court recognized in *Buckley*, money means votes.

Virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

. . . .

. . . The increasing importance of the communications media and sophisticated mass-mailing and polling operations to effective campaigning make the raising of large sums of money an ever more essential ingredient of an effective candidacy.

424 U.S. at 19, 26.

It is clear from the record in this case that the inferior funding of I-R and independent candidates places them at a substantial disadvantage in their election contests. Testimony to that effect went un rebutted.

If the check-off amount were doubled, as proposed in the 1976 legislative session, we can safely assume the disparity would double. If the decision below is sustained, there will be no impediment to enactment of a statute in which one party would have its campaigns fully funded, while the other would be left to raise its own monies, if it could. The result would be the death of the two-party system.

The Minnesota campaign financing scheme not only classifies candidates as favored or disfavored depending on their political affiliation or lack thereof, it also creates invidious classifications as to who can participate in determining the allocation of state funds. Prior to the 1978 amendments, only taxpayers were allowed to participate in the check-off. §10A.31, subd. 1. No provision was made for participation by voters who had no income tax liability such as plaintiff Selma Stenberg. The 1978 amendments enlarge the group of persons who may participate in the check-off to include those who file certain real property tax rebate applications and their spouses and dependents over age 18. The statute persists in denying participation to all eligible voters and continues to permit non-voter taxpayers to participate. Additionally, the amended section 10A.31, subd. 1 expressly provides the broadened check-off is effective beginning taxable year 1978. Thus it will not apply until after January 1, 1979. Nontaxpayers will have no voice in determining the allocation of funds to candidates in the 1978 elections.

If to discriminate in campaign funding between major parties is constitutionally permissible, then the ability to direct which party's candidates should receive funds constitutes participation in the electoral system. *Buckley*, 424 U.S. at 21. To restrict that ability to persons with income tax liability violates the principle that wealth is a constitutionally impermissible factor for determining eligibility to participate. See, *Harper v. Virginia Board of Elections*; *Bullock v. Carter*; *Lubin v. Panish*. Invidious discrimination such as that perpetrated upon nontaxpayers by the Minnesota scheme can be justified only if "necessary to promote a compelling state interest." *Dunn v. Blumstein*, 405 U.S. at 337. No such interest or necessity is present here.

3. *Buckley*.

This Court's previous cases on public financing of election campaigns, *Buckley* and *American Party of Texas v. White*, do not resolve the issues which arise here. In neither case was there unequal funding of major political parties or their candidates. The general election financing contained in Subtitle H of the Internal Revenue Code treated major-party Presidential candidates with precise equality, giving each \$20,000,000. *Buckley*, 424 U.S. at 88. The Presidential nominating convention financing, also upheld in *Buckley*, gave each major party an equal amount. 424 U.S. at 87. The party primary financing in *American Party of Texas* also appeared not to discriminate among the major parties. 415 U.S. at 792-93. The Presidential Primary Matching Payment Account, also challenged in *Buckley*, did not provide funds to the candidates of major parties, but only to persons seeking a party's

nomination. Each primary candidate could control the amount of federal matching funding by the extent of his fundraising.

In *Buckley* the Court saw four legitimate governmental interests in public financing of campaigns: 1) eliminating the improper influence of large private contributions; 2) relieving major-party Presidential candidates from the rigors of soliciting private contributions; 3) not funding hopeless candidacies with large sums of public money; and 4) avoiding artificial incentives to splintered parties and unrestrained factionalism. 424 U.S. at 96.

The Minnesota scheme is inconsistent with the first two of those interests and runs counter to the fourth. Disparate funding subjects the candidates of the disfavored party to a greater chance of influence by private contributors and imposes greater fundraising burdens upon them because they are forced to raise money simply to catch up with their opponents. Candidates of major parties are not "frivolous". They can demonstrate a "significant modicum of support". 424 U.S. at 96. To the extent discriminatory funding damages the two-party system, it promotes factionalism and splinter parties.

The discriminatory funding of major-party candidates may not be defended with the argument that in providing a reform the state may deal only with the most acute problems first. See, *Buckley*, 424 U.S. at 105; *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966). The major-party candidates who are eligible for public financing in Minnesota are similarly situated in relation to the desirability of the reforms. The only difference between them is their political philosophies and associations. On that subject the government must be neutral.

Nowhere in its opinion in *Buckley* did the Court suggest that discriminatory funding of major-party candidates is constitutionally permissible. Its only allusion to such discrimination was negative; it noted that a suggested scheme of funding all parties in proportion to the vote their candidates received in the last election "might unfairly favor incumbents, since their major-party challengers would receive less financial assistance." 424 U.S. at 98 n.133.

The Court also observed with respect to independent candidates that, "serious questions might arise as to the constitutionality of excluding from free annual assistance candidates not affiliated with a 'political party' solely because they lack such affiliation." 424 U.S. at 87 n.118. See, *Storer v. Brown*, 415 U.S. 724, at 745-46 (1974).

And finally, *Buckley* was a challenge to the facial invalidity of Subtitle H. Since it had never been in operation, appellants were "unable to offer factual proof that the scheme is discriminatory in its effect". The Court stated, "In rejecting appellants' arguments, we of course do not rule out the possibility of concluding in some future case, upon an appropriate factual demonstration, that the public financing system invidiously discriminates against non-major parties." 424 U.S. at 97 n.131. Factual proof of discriminatory effect upon major-party candidates is present here.

The Court's previous cases on campaign financing do not resolve the grave questions presented here and do not harbor a justification for the disparate treatment.

4. Due Process.

It may be suggested that the check-off procedure is permissible because it attempts to fund major parties and

their candidates only in proportion to their relative extent of public support. Assuming such proportional funding were lawful, the check-off does not in fact reflect such support. Rather, its effects are so arbitrary and capricious as to violate the Due Process Clause of the Fourteenth Amendment.

The check-off has nothing to do with past or present voter support for candidates or their parties. It is limited to certain taxpayers; non-taxpaying citizens and voters such as plaintiff Stenberg may not participate. Many may participate who are not eligible to vote in Minnesota because of age, residency, citizenship, incompetency, disenfranchisement, or death, but who must file an income tax return. See, §§200.02, subd. 25; 290.37, subd. 1(i); 290.39, subd. 2; 290.40(1); 290.44.

The check-off permits only the expression of taxpayer preferences for political parties. The financing goes to individual candidates.¹⁸ A taxpayer may not "split" his check-off as he may his vote. Nor may he express a preference for independent candidates.

The taxpayer preference must be expressed long before the identity of party candidates or their positions are known—when the annual tax return is filed. §290.42(1). Since Senate elections occur only every fourth year, the Senate share of taxpayer check-offs for tax year 1976, exercised for the most part in the early spring of 1977, will not be paid to Senate candidates until the fall of 1980—three and one-half years later. That delay is es-

¹⁸The Minnesota scheme is unique in this respect. None of the other states with tax check-offs, see note 17 *supra*, pay the sums determined by the check-offs directly to candidates. Instead, the money goes to the party designated on the return for use by it, which may include distribution to its candidates.

pecially significant because of the "potential fluidity of American political life." *Jenness v. Fortson*, 403 U.S. 431, 439 (1971). See, *Buckley*, 424 U.S. at 96-97, 73. The effect is to perpetuate artificially the support for a party or its candidates. The support may have evaporated because of critical events or issues or simply because of the electorate's disenchantment with too-familiar faces and programs or a change in the public mood.

To support the party of their choice taxpayers must declare their party allegiance on their income tax returns. The fear that auditors or others with access, or imagined access, to returns may react to such an expression may deter taxpayers from accurately indicating their preferences.

The failure of the taxpayer check-off to reflect accurately the support for candidates is apparent in this case. Plaintiff candidates all enjoyed the support of a majority of the voters in their legislative districts in their last election contests. Yet because of the check-off system the state paid their opponents more than twice the amount it paid them.

The decision whether to have public financing and, if so, the amount, is legislative. The Court has held that schemes which delegate legislative power to a narrow segment of the community¹⁹ violate the Due Process Clause of the Fourteenth Amendment where they produce "arbitrary or capricious results." *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 675 n.10 (1976); *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S.

¹⁹Only 372,311 taxpayers utilized the check-off on their 1974 returns. For the 1974 general elections there were 1,922,462 registered voters in Minnesota, of whom 1,296,209 voted.

116 (1928); *Eubank v. City of Richmond*, 226 U.S. 137 (1912). Here the taxpayers, encumbered by no standards, make arbitrary and capricious choices. The state simply adopts the result, without regard to its reasonableness or whether in fact it furthers any governmental interest.

5. The Decision Below.

The court below held that the unequal treatment of major-party and serious independent candidates did not abridge candidates' First Amendment rights or create invidious classifications, and that the check-off was a reasonable measure of public support. Appendix, p. 8-9, 13-14. It refused to subject Minnesota's scheme for campaign financing to strict scrutiny.

The appellants argued in *Buckley* that, by analogy to the Religion Clauses of the First Amendment, any public financing of election campaigns is unconstitutional. 424 U.S. at 92; Brief of the Appellants at 145-152. The Court rejected the analogy, calling it "patently inapplicable," 424 U.S. at 92, and noting the Religion Clauses and the Speech and Press Clauses differed in their purposes. 424 U.S. at 92 n.127. It concluded that Subtitle H was "a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." 424 at 92-93. The lower court merely recited that language from *Buckley*, stated the Minnesota scheme also enhanced First Amendment rights, and concluded those rights were not infringed upon and that strict judicial scrutiny was "inappropriate." Appendix, p. 8-9.

The lower court's reasoning that candidates' First

Amendment rights were not violated by discriminatory funding treatment is perplexing.²⁰ Plaintiffs did not question the principle of campaign financing; their challenge was to the disparate treatment of candidates and the mechanism by which it results. The Court's reliance on *Buckley* is misplaced; the *Buckley* rationale sustaining public funding is inapposite to the question of discriminatory public financing.

The court below found that demonstrated public support could properly be considered in the distribution of public funds and that the check-off was a "reasonable measure of popular support." Appendix, p. 14. The means does not validate the end. The discrimination is no less invidious or pernicious because of its genesis in a taxpayer "referendum" as opposed to a statute. Discriminatory treatment by the state may not be immunized by delegating to the citizens the power to discriminate. *Hunter v. Erickson*, 393 U.S. 385 (1969); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Lucas v. Colorado General Assembly*, 377 U.S. 713 (1964); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). As the Court said in *City of Eastlake v. Forest City Enterprises, Inc.*, "The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed." *Hunter v. Erickson*, 393 U.S. at

²⁰The court's language on page 9 of its opinion, that "the public financing provisions of the Act do not infringe upon the First Amendment rights of political candidates," cannot be squared with its subsequent conclusion that "the method of distribution of public campaign funds required by section 10A.31(5)(f) invidiously discriminates between candidates of different political parties and abridges the First Amendment right of political association." Appendix, p. 19. Thus, the two-fold discrimination resulting from check-off preferences does not impinge on constitutionally protected rights, but the undetermined discrimination caused by application of state-wide preference ratios to legislative district races does.

392." 426 U.S. at 676. Moreover, as discussed earlier, the Minnesota check-off is a far cry from a voter referendum.²¹

Neither is it merely a device by which individuals make private contributions. The money received by candidates from the Fund in an appropriation of the state. §10A.31, subd. 4. Participation in the check-off does not alter tax liability in any way.²² §10A.31, subds. 1, 3. In that respect it is similar to the Federal check-off. *Buckley*, 424 U.S. at 91. Just as in Subtitle H, the check-off is simply the means by which the legislature determines the amounts of its appropriations to the accounts within the Fund.

²¹Because of the inclusions and exclusions of participants, because of the limitation that only party preferences may be expressed, and because of the timing and privacy problems inherent in the scheme, the income tax check-off is not a reasonably accurate means of determining voter support for candidates. The court below considered those deficiencies seriatim, concluding that each was not sufficient by itself to render the check-off unconstitutional. Appendix, p. 15-18. It failed to analyze their combined effect on the reasonableness of the check-off as a barometer of support for candidates or on the question whether it violates the Due Process Clause. See, *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. at 675 n.10; *Washington ex rel. Seattle Title Trust Co. v. Roberge*; *Eubank v. City of Richmond*.

²²This serves to distinguish the check-off from provisions in the tax laws providing tax credits or deductions for political contributions. The court below noted the existence of such statutes, and stated they were "directly analogous" to the check-off scheme. Appendix, p. 14. It is, however, a question of fact whether tax benefits provide a sufficient motivation for contributors so that it can legitimately be concluded the state is subsidizing the candidate, especially considering the lengthy delay which occurs between the giving of a political contribution and the subsequent claim of a credit or deduction on a tax return. Even if there is such a connection, the participation of the State in effecting any discrimination is less direct than that occurring here. Moreover, the fact that tax deductions and credits for political contributions "have rarely been criticized on equal protection grounds," Appendix, p. 14, hardly provides a justification for the discrimination under the check-off scheme.

6. Alternatives.

Alternative methods of public financing of election campaigns exist which neither disadvantage some major-party candidates nor interfere with the attainment of legitimate governmental interests. Exactly such a system was upheld in *Buckley*. Equal financing of opposing major-party candidates and independent candidates who have demonstrated voter support is the best compromise between total equality on the one hand and the avoidance of factionalism and the funding of frivolous candidacies on the other. Such a system can adequately further the governmental interests involved. It would not penalize major-party candidates for their political associations and would not add to the advantages incumbents already possess. The discriminatory treatment under the present scheme is unrelated to any valid governmental interests; indeed, it increases the necessity of fundraising from private sources for disfavored candidates. The existence of non-discriminatory alternatives emphasizes the conclusion that the Minnesota scheme is unconstitutional.

CONCLUSION

Minnesota's campaign financing law invidiously discriminates among major-party candidates and penalizes their right of political association. It does not allow independent candidates to participate in pre-election financing regardless of their voter support. It gives the power to decide the amounts the state will pay candidates to a narrow group of the populace and does not allow all voters a role in that allocation. Its arbitrary and capricious results bear no relation to any legitimate state interests, all of which

can be adequately served by less burdensome alternatives. The decision below cannot be sustained on the grounds advanced by the lower court. The issues are substantial, of public importance, and have not previously been confronted by the Court. Probable jurisdiction should be noted and the case designated for plenary consideration.

Respectfully submitted,

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April, 1978

Appendices

A-1

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

OTTO T. BANG, JR., NANCY BRATAAS, WILLIAM
G. KIRCHNER, CHARLES BERG, GERALD
KNICKERBOCKER, RAY O. PLEASANT, ARNE
H. CARLSON, GARY W. LAIDIG, SELMA STEN-
BERG and JOHN HEEGAARD,

Plaintiffs,

vs.

HAROLD CHASE, ELIZABETH EBBOTT, DAVID
DURENBERGER, SPENCER SOKOLOWSKI, ROG-
ER F. NOREEN and CONSTANCE BURCHETTE,
in their capacities as the members of the State Ethical
Practices Board; JIM LORD, in his capacity as the
Treasurer of the State of Minnesota; ARTHUR C.
ROEMER, in his capacity as the Commissioner of the
Minnesota Department of Revenue; and GARY W.
FLAKNE, in his capacity of Hennepin County Attorn-
ney,

Defendants.

MEMORANDUM ORDER

3-76 Civ. 272

JEROME TRUHN, Esq., and THOMAS V. SEIFERT,
Esq., Head & Truhn, Minneapolis, Minnesota, appeared
for the plaintiffs.

Warren Spannaus, Attorney General, State of Minnesota, by RICHARD B. ALLYN, Esq., Solicitor General, RICHARD A. LOCKRIDGE, Esq., KATHRYN RUSH, Esq., and PAUL G. ZERBY, Esq., Special Assistant Attorneys General, appeared for State Defendants.

BEFORE: HEANEY, Circuit Judge, DEVITT, Chief District Judge and ALSOP, District Judge.

Per Curiam.

This case is again before this three-judge panel¹ upon plaintiffs' request to declare unconstitutional key provisions of the Minnesota Ethics in Government Act, Minn. Stat. §§ 10A.01 *et seq.* (1976), and to enjoin the enforcement of its provisions.²

The Ethics in Government Act is an intricate statutory attempt by the Minnesota legislature to regulate Minnesota election campaigns. The Act provides sweeping changes in the way state political campaigns are conducted and financed by establishing contribution and expenditure limitations, financing at least part of many can-

¹A three-judge court was requested pursuant to 28 U.S.C. §2281 and properly convened under 28 U.S.C. §2284. Although Section 2281 was repealed by Pub.L. 94-381, 90 Stat. 1119, on August 12, 1976, section 7 of Pub.L. 94-381 provided, "[t]his Act shall not apply to any action commenced on or before the date of enactment." Since this action was commenced August 2, 1976, section 2281 applies.

²The court has subject matter jurisdiction under 28 U.S.C. §1343 because this action is brought to redress deprivations of federal constitutional rights guaranteed by the First and Fourteenth Amendments to the United States Constitution and the Civil Rights Act of 1871, 42 U.S.C. §1983.

didates' election campaigns, and requiring extensive record keeping.

The challenged provisions of the Act: (a) limit the amount an individual may spend "on behalf [of] or in opposition to the opponent of a candidate," Minn. Stat. § 10A.27(1), *Expenditure Limitations, infra*; (b) finance the election campaigns for state legislators by allowing taxpayers to designate on their income tax forms whether they wish to allocate one dollar from the state treasury to the state elections campaign fund and, if so, whether that dollar will go to an earmarked party account or to a general account, Minn. Stat. §§ 10A.30-.33, *Campaign Financing, infra*; (c) require an individual intending to spend more than \$20 on behalf of a candidate to either obtain from the candidate prior written authorization and certification that the expenditure will not exceed the candidate's expenditure ceiling or publicly disclaim any authorization, Minn. Stat. § 10A.17(2), and require any person who solicits contributions or makes expenditures on behalf of a candidate to publicly disclose any lack of that candidate's written authorization, Minn. Stat. § 10A.17(5). *See Authorization, Certification or Disclaimer infra.*

Plaintiffs are three incumbent Independent-Republican (IR) Senators (Bang, Brataas, Kirchner), one incumbent independent Senator (Berg), four incumbent IR members of the House (Knickerbocker, Pleasant, Carlson, Laidig), one person who had no state income tax liability in 1975 (Stenberg), and one person who claims to be a potential political contributor and spender (Heegaard).³

³The court has decided that each plaintiff has "such a personal stake in the outcome of the controversy" so as to confer standing to challenge the constitutional validity of the respective provisions. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

They contend that the financing provisions and expenditure limitations of the Act substantially burden fundamental constitutional rights—freedom of association, freedom of speech, due process and equal protection—guaranteed by the First and Fourteenth Amendments.

Defendants are the members of the Ethical Practices Board, the State Treasurer, the Commissioner of the Department of Revenue, and the Hennepin County Attorney. They argue that the entire Act is constitutional because it advances vital interests and only incidentally infringes upon plaintiffs' rights.

At the outset it should be noted that the Minnesota legislature passed the Ethics in Government Act before the United States Supreme Court addressed the issue of campaign regulation and financing in *Buckley v. Valeo*, 424 U.S. 1 (1976). Thus, when the Minnesota legislature adopted the Minnesota Act, it did not have the benefit that this Court has of the Supreme Court's guidelines as contained in *Buckley* regarding the constitutional parameters surrounding the newly emerging concept of public financing of political campaigns.

Buckley establishes the constitutional limits of the Federal Election Campaign Act of 1971, as amended. It is dispositive of some but not all of the issues here presented. To the extent that the Minnesota Act parallels its federal counterpart, *Buckley* controls. To the extent that the Minnesota Act varies from the Federal Act, the general policy consideration presented in *Buckley* are of assistance.

EXPENDITURE LIMITATIONS

The expenditure limitations of section 10A.27(1) of the Act prohibits persons or groups completely indepen-

dent of a candidate from making expenditures "on behalf [of] or in opposition to the opponent of a candidate . . . in an amount in excess of ten percent of the amount that may be spent by or on behalf of that candidate as set forth in section 10A.25."

The aggregate expenditure limit of section 10A.25 (2)⁴ for candidates for office of state senator in an election year is 20 cents per capita or \$15,000, whichever is greater. The corresponding limit for candidates for the office of state representative in an election year is 20 cents per capita or \$7,500, whichever is greater. In a non-election year, subdivision 6 limits expenditures to 20% of these amounts.

Thus when this suit was originally before the court upon plaintiffs' request for a preliminary injunction, section 10A.27(1) prevented independent individuals or groups from spending more than \$1,500 "on behalf [of] or in opposition to the opponent of a candidate" for the state senate. The corresponding limit for expenditures on behalf of a candidate for the state house of representatives was \$750.

Immediately after the October 1, 1976 hearing on plaintiffs' request for a preliminary injunction, the court preliminarily enjoined the enforcement of the independent expenditure limitations of section 10A.27(1) of the Act. In our order of October 12, 1976, we continued this injunction in effect.

In the opinion of the court, the Supreme Court's invalidation of the \$1,000 individual expenditure ceiling of

⁴Although not directly challenged here, the court has determined that the ceilings on overall campaign expenditures of section 10A.25 are unconstitutional in their present form. See *Severability, infra*.

the Federal Election Campaign Act, as amended,⁵ dictates that the corresponding limitations in section 10A.27(1) of the Minnesota Act are unconstitutional. *Buckley v. Valeo*, 424 U.S. 1, 45-51 (1976). Reducing the amount of money a person can spend on communications drastically curtails First Amendment rights.⁶ As the Supreme Court observed in *Buckley*, "[b]eing free to engage in unlimited political expression subject to a ceiling on expenditure is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline." *Id.* at 19 n. 18.

When this matter was first argued, defendants attempted to distinguish the holding in *Buckley* by pointing out that the Minnesota limitations are higher than the federal counterpart when compared with the area within which the funds will be spent; violation of the Minnesota limitations is punishable by a civil fine of only four times the excess expended while violation of the federal limit is punishable by a criminal penalty; and advisory opinions, which were not available under the Federal Act, are available under the Minnesota provisions. We were not persuaded by these distinctions then, nor are we now. As we

⁵18 U.S.C. §608(e)(1) (1970 ed., Supp. IV).

⁶As the Supreme Court observed in *Buckley v. Valeo*, 424 U.S. 1, 19 (1976):

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

have previously observed, simply because an individual is permitted some speech does not mean he may be constitutionally forbidden to engage in more. Nothing in *Buckley* suggests that higher expenditure ceilings on independent expenditures would be permissible. Rather, *Buckley* seems to invalidate all such restrictions on speech.

Thus we now find that the independent expenditure limitations of section 10A.27(1) of the Act, which prohibit persons or groups completely independent of a candidate from making expenditures "on behalf [of] or in opposition to the opponent of a candidate" for state legislative office, are unconstitutional as violative of First Amendment rights.

CAMPAIGN FINANCING

The Act provides that every individual whose income tax liability is one dollar or more may designate on his or her state income tax form whether one dollar of state funds shall be paid into the state elections campaign fund. Minn. Stat. §10A.31(1). If the taxpayer chooses to do so, he or she is given the option of assigning the dollar to either an earmarked party account or to the general account.⁷ Minn. Stat. § 10A.31(2). In so doing, the tax-

⁷In 1975, \$372,311 was designated to the state elections campaign fund pursuant to section 10A.31. Of that amount, \$68,395 was designated to the IR party account, \$175,259 was designated to the DFL party account, \$3,488 was designated for minor parties' accounts, and \$135,169 was designated to the general account.

The Commissioner of Revenue has estimated that in 1976, \$440,834 was designated to the fund pursuant to section 10A.31. Of that amount, \$99,188 was designated to the IR account, \$187,354 was designated to the DFL party account, \$3,527 was designated to minor parties' accounts, and \$150,765 was designated to the general account.

payer's income tax liability does not increase.

Within two weeks after certification of the results of the primary election, funds from the party accounts are distributed to the respective party's candidates who have agreed to the contribution and expenditure limitations of section 10A.25, and whose names are to appear on the general election ballot. Minn. Stat. §§ 10A.31(6), 10A.32 (3). Funds from the general account are distributed after the general election in equal amounts to all candidates for each statewide office who received at least five percent of the votes for that office and to all candidates for legislative office who received at least ten percent of the vote for the office for which they ran. Minn. Stat. § 10A.31(7).

A. The party-designated tax check-off system.

Plaintiffs first challenge the basic notion that a party-designated check-off system should be used as a method for the public financing of political campaigns. They contend that since the distribution of public campaign financing money on the basis of taxpayer preference inevitably results in the disparate funding of major party candidates, it unconstitutionally burdens free speech and association and invidiously discriminates between candidates of major parties.⁸

This contention does not withstand analysis. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court re-

⁸Plaintiffs cite the fact that, in 1975, the winners of the DFL primary elections for State Senate received \$1,674 from the DFL account while their IR opponents received only \$824 from the IR account. DFL House candidates who won the primary election received \$824 from the DFL account, while their IR opponents received only \$409 from the IR account.

jected a First Amendment challenge to federal public campaign financing provisions,⁹ holding that they constitute "a congressional effort, not to abridge, restrict or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Id.* at 92-93. Therefore, the public financing provisions of the federal law were held to enhance, rather than abridge, the First Amendment rights of political candidates. *Id.* Certainly, the Minnesota Act's public financing provisions do the same.

Since the public financing provisions of the Act do not impinge upon the First Amendment rights of political candidates, plaintiffs' equal protection challenge also fails. Where state action is "affirmative and reformatory" in nature, creating no suspect classifications and impinging upon no constitutionally protected rights, strict judicial scrutiny is inappropriate. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 39-40 (1973). Instead, the reviewing court must proceed "under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution." *Id.* at 39. See also *Buckley v. Valeo*, *supra* at 93-96. Under this less exacting test, the Minnesota Act must be sustained if it "bear[s] some rational relationship to [a] legitimate state purpos[e]", *San Antonio Independent School District v. Rodriguez*, *supra* at 40, or, in the words of the *Buckley* Court, that it furthers "sufficiently important governmental interests and has not unfairly or unnecessarily burdened the political opportunity of any party or candidate." *Buckley v. Valeo*, *supra* at 95-96.

⁹See I.R.C. §§ 6096, 9001-9012, 9031-9042.

By serving to cleanse the political process, the public financing provisions of the Act serve an important governmental interest. Indeed, in the words of a House committee, unlimited private campaign spending leads

to a closed, insulated, self-perpetuating system, dominated by special interests and unresponsive to the public will * * * which often creates the impression that only the rich can run for public office, and that a candidate can buy an election by spending large amounts of money in a campaign.

Such a situation works an inequitable hardship on the candidate who cannot compete with the resources of great wealth, but of even greater significance, it is unfair to the electorate which is entitled to have presented to it for its evaluation and judgment candidates from all walks of life and not just those persons who, because of their wealth, can conduct a campaign which resorts to techniques which are more appropriate to merchandizing a product than to familiarizing the public with a candidate's qualities as a potential public official and his program for the country.¹⁰

The impact of special interest contributions on the political decision making process has been of particular concern.¹¹ In 1972, eighteen individuals gave nearly \$7.5 million to the Committee to Re-elect the President—more than the entire amount spent by Lyndon Johnson in his

¹⁰H.R. Rep. No. 564, 92d Cong., 1st Sess. 4 (1971).

¹¹See S. Rep. No. 981, 93rd Cong., 2d Sess. (1974); Hearings on S. 1103, S. 1954, and S. 2417 Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration, 93rd Cong., 1st Sess. (1973).

1964 presidential campaign.¹² Approximately \$5.3 million was given by twenty-five top donors and lenders to the McGovern campaign in 1972.¹³ Special interest groups "invested" \$22.6 million in the 1976 congressional campaigns, nearly double the \$12.5 million spent by such groups in 1974.¹⁴

There is little disagreement that large campaign contributions are often given with the expectation of a political *quid pro quo* from the elected candidate. Senator Hugh Scott, former Senate Minority Leader, has stated that:

No member of this body could be honest with himself if he did not admit that in running for reelection, he had found it necessary to accept large contributions * * * from those contributors who were willing to support his cause. * * * [T]hose contributions have inevitably raised a sense of obligation. Deny it how we will, the sense of obligation persists, and all of us have been involved in the exercise. I have used it myself. When someone offers to do something for me and makes a contribution to me, I have to ask myself, what is the obligation involved. I wonder, when someone comes back later and asks me to do something—hopefully they ask me to do something I can do—would he embarrass me by asking me to do something that I should not do * * *.¹⁵

¹²*Ibid.* at 66 (statement of Sen. Adlai E. Stevenson III).

¹³Nicholson, *Campaign Financing and Equal Protection*, 26 Stan. L. Rev. 815, 819 (1974).

¹⁴Common Cause, *Frontline*, April-May 1977, at 3.

¹⁵Hearings on S. 1103, S. 1954 and S. 2417 Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration, 93rd Cong., 1st Sess. at 189 (1973) (quoted in statement of Professor David Adamany of the University of Wisconsin).

As the Supreme Court noted in *Buckley*, financing political campaigns through private contributions creates not only the danger of actual corruption, but it also creates the appearance of corruption and, thus, undermines public confidence in the political process.¹⁶

Reliance on privately raised campaign funds forces candidates to spend vital time and energy on fund raising. Such time and energy could be better spend on the development of policy and the communication of that policy to the voting public. The search for private campaign funds is, in the words of a veteran of the campaign trail, "the most demeaning, disgusting, depressing, and disenchanting part of politics."¹⁷ The time, effort and indignity involved in private fund raising "has driven too many capable men and women away from seeking high public office. Sadly, the Nation is the poorer for this."¹⁸

Nor have plaintiffs adequately demonstrated that the Act's public financing provisions will unfairly or unnecessarily burden the political opportunity of minority party candidates. The mere fact that, in a given year, IR candidates received less public money from their party account than did DFL candidates provides no basis for predicting that the Act will invariably and invidiously benefit the majority party. See *Buckley v. Valeo*, *supra*

¹⁶See *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976).

¹⁷Statement of Senator Hubert Humphrey, 119 Cong. Rec. 14985 (daily ed. July 28, 1973).

¹⁸Statement of Arnold Picker, Chairman, Ad Hoc Committee on Financing, Democratic National Committee, in Hearings on S. 1103, S. 1954 and S. 2417 Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration, 93rd Cong., 1st Sess., 7 (1973).

at 33.¹⁹ The amount which taxpayers choose to designate for either party account is dependent upon many factors, including the performance of a party's previously elected candidates and the efforts of party leaders in encouraging their supporters to use the income tax check-off.²⁰ Cf. *Buckley v. Valeo*, *supra* at 32-33. Moreover, a party which receives less public financial support is free to raise money from private sources.²¹ See *id.* at 95. "Plainly, campaigns can be successfully carried out by means other than public financing; they have been up to this date, and this avenue is still open to all candidates." *Id.* at 101.

It is clear that a party's or candidate's demonstrated public support may properly be considered in the distribution of public campaign funds. See *Buckley v. Valeo*, *supra* at 92 n.128, 96. As long as the statutory scheme is reasonably calculated toward that end, this court has no power to invalidate one legislative choice in favor of another. *Id.* at 99-100, 106. Indeed, the party-designated

¹⁹Indeed, while \$68,395, or 18.4 percent of the total amount checked off by taxpayers was designated for the IR party account in 1975, this increased to \$83,218, or 22.1 percent of the total checked off in 1976. The percentage checked off for the DFL party account decreased from \$175,259, or 47.0 percent, to \$164,071, or 43.6 percent, during the same period. (Statistics compiled by Leonard F. Peterson, Research Analyst, Minnesota Department of Revenue.)

²⁰Although public participation in the Minnesota income tax check-off has increased since the Act has been in effect, the check-off is utilized by a minority of taxpayers. In 1975, \$372,311 was checked off for either a party-designated account or to the general account, out of a total of 1,669,794 processed individual income tax returns. This increased to \$376,223 checked off on 1,584,086 processed individual income tax returns in 1976. It is estimated that \$452,900 will be checked off on approximately 1,791,297 returns expected to be filed in 1977. (Statistics compiled by Leonard F. Peterson, Research Analyst, Minnesota Department of Revenue.)

²¹Receipt of public campaign financing money may, of course, properly be conditioned upon a candidate's agreement to abide by specified expenditure limitations. *Buckley v. Valeo*, 424 U.S. 1, 57 n. 165 (1976). See *Severability*, *infra*.

tax check-off system in use in Minnesota and in seven other states²² both acts as a reasonable measure of popular support and has been cited as preferable to other plans since taxpayer designation of the recipient of public money minimizes state involvement in the distribution decision.²³

As a citizen-mediated means for the distribution of public campaign funds, the party-designated tax check-off used in the Minnesota Act is directly analogous to statutes which allow income tax credits and deductions for political contributions.²⁴ In either case, the public is subsidizing the taxpayer's political contributions to the political party or candidate of his choice. See *Buckley v. Valeo*, *supra* at 107 n.146. It is no more likely that tax deductible political contributions will be evenly distributed between major party candidates than that revenues from the party-designated tax check-off will be; however, tax deductions and credits for political contributions have rarely been criticized on equal protection grounds.²⁵

²²See Idaho Code §§34-2501 - 34-2505 (Cum. Supp. 1977); Iowa Code §§56.18-56.26 (Supp. 1977); Ky. Rev. Stat. §§118.015, 141.071-141.073 (Cum. Supp. 1976); Me. Rev. Stat. Tit. 36, §5283 (Supp. 1973); N.C. Gen. Stat. §105-159.1 (Cum. Supp. 1975); R.I. Gen. Laws §44-30-2(e) (Supp. 1976); Utah Code Ann. §§59-14A-99, 59-14A-100 (Supp. 1977).

²³See Rosenthal, *Campaign Financing and the Constitution*, 9 Harv. J. on Legis. 359, 415 (1972); Barrow, *Regulation of Campaign Funding and Spending for Federal Office*, 5 U. of Mich. J. of L. Ref. 159, 186 (1972).

²⁴See e.g., Minn. Stat. §§290.06 (11) (1976); I.R.C. §§41, 218.

²⁵See Rosenthal, *supra* at 417-418; J. Fleishman, *Public Financing of Election Campaigns: Constitutional Constraints on Steps Toward Equality of Political Influence of Citizens*, 52 N.C. L. Rev. 349, 403-404 (1973). If there is an equal protection flaw in the granting of tax deductions for political contributions, it lies in the differential benefit which tax deductions afford different classes of taxpayers. Taxpayers who do not itemize deductions receive no benefit at all. For those who do itemize deductions, the value of the political deduction will be greater for those in high tax brackets than for the poor. *Id.* at 404.

Plaintiffs next contend that the Act's party-designated tax check-off system is violative of various constitutional rights of taxpayers or of the voting public. First, they contend that use of the Minnesota tax form is both over- and under-inclusive since many voters may not have any state income tax liability and, conversely, that many persons who have a state income tax liability may not be eligible to vote in state elections.

Concededly this provision is both over- and under-inclusive. However, there is nothing before the court from which it can determine the number of persons either improperly included or excluded. Although the court is concerned about the constitutionality of excluding persons who have no tax liability from being able to designate one dollar to the fund, without a factual showing of the number of persons affected, the court is unwilling to hold that this portion of the Act violates the Equal Protection Clause of the Fourteenth Amendment.

Second, plaintiffs contend that the party-designated tax check-off system violates a taxpayer's right to privacy of association. They contend that requiring a taxpayer to declare his political affiliation on his income tax return before the State will distribute funds to his party's candidates constitutes an infringement upon the taxpayer's First Amendment rights.

The argument that it is unconstitutional to require a taxpayer to indicate his party preference before his tax contribution will be given by the State to the political party of his choice is not persuasive, since it is impossible for the State to distribute the money unless the taxpayer's preference is known. If a taxpayer wishes to have his tax contribution paid in its entirety to the political

party of his choice, he must be willing to indicate that choice on his income tax form. If he does not wish to indicate his party affiliation, he must be satisfied either to check off the general account or to make a private contribution to his political party. No statute could accomplish more.

Plaintiffs' privacy argument is particularly specious in view of the Supreme Court's decision in *Buckley* which sustained federal reporting and disclosure requirements²⁶ against constitutional attack. *Id.* at 64-68. If compelled public disclosure of private campaign contributions does not unconstitutionally infringe upon privacy of association and belief, surely there is no unconstitutional infringement by a statute which merely provides a taxpayer the opportunity to indicate his party preference on his tax form,²⁷ the contents of which are shielded under threat of criminal penalty from public view.²⁸

Moreover, by giving the taxpayer the right to choose the political party to which his tax dollar will go, the Minnesota Act avoids the criticism leveled at nonpartisan account tax check-off plans. The criticism is that a taxpay-

²⁶See 2 U.S.C. §§ 431 *et seq.* (1970 ed., Supp. IV). Disclosure requirements are utilized in some form in forty-eight states. See Comment, *Campaign Finance Acts—An Attempted Balance Between Public Interests and Individual Freedoms*, 24 Kan. L. Rev. 345, 388 n. 367, 370 (1976).

²⁷In *Buckley v. Valeo*, *supra*, the Court indicated that exemption from compelled disclosure might be appropriate upon a factual showing that "compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Id.* at 74. There is, of course, no need for exemption from participation in the party-designated income tax check-off since designation of party preference is voluntary. Moreover, as discussed *infra*, plaintiffs have adduced no evidence that by checking off the IR accounts, they have been subjected to any threats, harassments or reprisals from anyone.

²⁸Minn. Stat. §290.611 (1976).

er who chooses to contribute is forced to finance the dissemination of ideas with which he does not agree.²⁹ In *Buckley*, the Court indicated that although taxpayers need not be given the opportunity to designate the recipient of their tax contributions, public financing plans which afford such choice are less restrictive of taxpayers' First Amendment rights. *Id.* at 92 n.125.

As a corollary to their privacy argument, the plaintiffs argue that the party-designated income tax check-off is unconstitutional because an individual who might otherwise use the check-off will be deterred by fear of politically motivated income tax audits. This argument is without merit. The use of the party-designated check-off is voluntary; an individual who does not wish to indicate his party preference may exercise his First Amendment rights either by checking off the general fund or by making private campaign contributions. See *Buckley v. Valeo*, *supra* at 28. The plaintiffs admit that they have no evidence that individuals who check off the I.R. account will be threatened or harassed by employees of the Minnesota Department of Revenue; without evidence, the bare allegation that Revenue Department employees will engage in retaliatory auditing is not only "highly speculative," *id.* at 70, but unworthy of consideration by this Court.

Lastly, plaintiffs contend that the party-designated

²⁹In commenting upon attempts to extend public financing to congressional campaigns, Representative Bill Frenzel stated:

Public financing forces the taxpayer to support candidates who are in opposition to [his] own political views. Public financing denies the taxpayer the right to designate where his or her contribution will go.

H.R. Rep. No. 93-1239, 93rd Cong., 2d Sess. 155 (1974) (Supp. views of Rep. Bill Frenzel); Comment, *Buckley v. Valeo: The Supreme Court and Federal Campaign Reform*, 76 Colum. L. Rev. 852, 885 (1976).

tax check-off is violative of equal protection and due process because a taxpayer must choose the party to which he wishes to contribute in advance of his knowledge of that party's candidates. Plaintiffs cite the fact that in non-election years, years may pass before the preferences expressed by taxpayers on income tax forms are effectuated.³⁰

We agree that a closer correlation in time between taxpayer designation of public campaign funds and their eventual distribution would be desirable, and a proper subject of further legislative scrutiny. However, the existence of this time lapse does not render the Act's public financing scheme unconstitutional. Since it was held in *Buckley* that a tax check-off system which allows the taxpayer no choice as to where his contribution will go meets constitutional standards,³¹ *a fortiori* a system which affords the taxpayer some choice cannot be invalid because it does not achieve a perfect correlation between the taxpayer's desire and the tax dollar's appropriation.

In summary, we find no constitutional infirmity in those sections of the Minnesota Ethics in Government Act which establish a party-designated tax check-off system for the collection of public campaign funds.

B. The distribution of public funds to legislative candidates.

Plaintiffs also challenge the method used to distribute specific party funds to legislative primary winners. Under the Act, winners of the primary election of each party for

³⁰Indeed, 40% of the funds designated by taxpayers on their Minnesota income tax forms in 1975 will not be distributed to candidates until the 1978 elections for state wide officers.

³¹See *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976).

the state senate and house of representatives share equally in the funds allocated to their respective offices from their party account. Minn. Stat. § 10A.31(5) (f). Thus the funding for the specific party accounts is determined by taxpayer preference on a state wide basis while the party accounts are required to be distributed at the legislative district level.

There is no counterpart to this provision in the Federal Election Campaign Act, as amended. Funding under the federal scheme measures support on a nation-wide basis for a national office. A federal equivalent to the Minnesota system would collect disparate amounts for each party on a national basis and distribute these funds on a state wide basis to candidates for the United States Senate and House of Representatives.

In the opinion of the court, the aggregate political party preferences expressed by all the state taxpayers in Minnesota have no rational relation to the support for particular candidates within legislative districts. Under this distribution scheme, a party with state wide plurality can unfairly disadvantage its opponents in those districts where it enjoys little district support. Accordingly, we find that the method of distribution of public campaign funds required by section 10A.31(5) (f) invidiously discriminates between candidates of different political parties and abridges the First Amendment right of political association.

AUTHORIZATION, CERTIFICATION, OR DISCLAIMER

Section 10A.17 of the Minnesota Ethics in Government Act provides, in relevant part:

Subd. 2. No person or persons acting in concert other than the candidate and the treasurer of the candidate's principal campaign committee may make expenditures of more than \$20 with the authorization or consent, express or implied, of a candidate or his agent, or under the control, direct or indirect, of a candidate or his agent on behalf of a candidate without receiving from the treasurer of that candidate's principal campaign committee (i) prior written authorization and (ii) certification that the expenditures will not exceed the limits on expenditures as set forth in sections 10A.25 and 10A.27.

* * *

Subd. 5. Any political committee, political fund or person who solicits or accepts contributions or make[s] expenditures on behalf of any candidate without the written authorization of the candidate shall publicly disclose its lack of authorization. In all written communications with those from whom it solicits or accepts contributions or to whom it makes expenditures, the committee, fund or person shall state in writing and in conspicuous type that it is not authorized by the candidate and that the candidate is not responsible for its activities. A similar oral statement shall be included in all oral communications. A similar written statement shall be included in conspicuous type on the front page of all literature and advertisements published or posted and a similar oral statement included at the end of all broadcast advertisements by [the] committee, fund or person in connection with the candidate's campaign.

Plaintiffs contend that these restrictions violate the First Amendment because they create an invalid prior restraint on speech, regulate the content of speech, and are unconstitutionally vague and overbroad.

Defendants respond that these provisions serve several basic state interests and that any First Amendment infringement is only incidental. They argue that these provisions enable candidates to supervise expenditures so as not to exceed the limits on campaign expenditures established in sections 10A.25 and 10A.27. Defendants also argue that the provisions protect the public's right to know the source of all authorized expenditures.

We agree with plaintiffs that section 10A.17(2) cannot stand. The primary purpose of that provision is to aid candidates in complying with the campaign expenditure limitations found in sections 10A.25 and 10A.27. Since those sections are unconstitutional as written,³² the governmental purposes which would have justified the First Amendment infringement imposed by section 10A.17(2) no longer exists. *See Buckley v. Valeo*, 424 U.S. 1, 75-76 (1976).

We find, however, that the governmental interests served by section 10A.17(5) are sufficient to justify any incidental infringement upon First Amendment rights. This section serves important governmental interests both in enabling the public to determine which communications have been authorized by a particular candidate and in protecting a candidate from unauthorized communications which do not accurately reflect his political position. *Cf. Buckley v. Valeo, supra* at 81.

Plaintiffs contend that the use of the phrase "expen-

³²See *Expenditure Limitations, supra*, and *Severability, infra*.

ditures on behalf of any candidate" leaves the application of this section sufficiently uncertain as to render it unconstitutionally vague. Although the quoted phrase is not expressly defined in the Act, its meaning is sufficiently plain from the statutory context in which it appears. "Expenditure" is defined in the Act as the use of money or other valuable asset "for the purpose of influencing the nomination * * * or election of any candidate to office." Minn. Stat. §10A.01(10) (a). Thus, "expenditures on behalf of any candidate" clearly means expenditures made for the purpose of influencing the nomination or election of any candidate. Although this definition could potentially encompass expenditures made in the furtherance of public discussion of current issues as well as those expenditures made in advocacy of a political result, see *Buckley v. Valeo*, *supra* at 79, the Minnesota State Ethical Practices Board has narrowly interpreted "expenditures on behalf of any candidate" to be limited to communications which directly refer to an individual's candidacy and which urge his nomination or election.³³ As interpreted, §10A.17(5) is "directed precisely to that spend-

³³See Minnesota State Ethical Practices Board, Advisory Opinions Nos. 4, 8 and 11 (issued on July 17, 1974, September 23, 1974, and November 13, 1974, respectively). In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court recognized that statutory vagueness can be alleviated by a comprehensive series of advisory opinions from a properly empowered administrative agency. It held that the Federal Election Commission was not so empowered since the right to obtain advisory opinions was limited to candidates, federal officeholders and political committees, and the Commission was directed to respond to such requests only "within a reasonable time." *Id.* at 40-41 n.47. By contrast, the Minnesota State Ethical Practices Board is directed to issue advisory opinions as to the Act's requirements upon the requests of anyone who "wish[es] to use the opinion to guide [his] own conduct," and opinions must be issued by the Board within thirty days of the request's receipt unless a majority of the Board agrees to an extension of time. Minn. Stat. §10A.02(12).

ing that is unambiguously related to the campaign of a particular * * * candidate," and constitutes no undue infringement on First Amendment rights. *Id.* at 80.

SEVERABILITY

The only remaining issue is whether our holdings today invalidating certain segments of the new Minnesota Ethics in Government Act requires us to enjoin the enforcement of the entire Act.

Minn. Stat. § 645.20 states:

If any provision of a law is found to be unconstitutional and void, the remaining provisions of the law shall remain valid, unless the court finds the valid provisions of the law are so essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume the legislature would have enacted the remaining valid provisions without the void one; or unless the court finds the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

Thus this section creates a presumption of severability which is rebutted only if the court concludes the Minnesota legislature would not have enacted the valid portions without the void ones.

Today we have sustained plaintiffs' challenge to the expenditure limitations found in section 10A.27(1) of the Minnesota Ethics in Government Act. In examining the remaining provisions of the Act which involve the same subject matter in order to determine legislative intent, we find that the application of the expenditure limitations

found in section 10A.25 are unconstitutional in some circumstances as well. Section 10A.25 (2) sets aggregate limitations on the amount which can be spent "by a candidate or by a political committee, political fund or individual which makes expenditures with the authorization, express or implied, and under the control, direct or indirect, of the candidate or his agents" for each elective office. Since this section imposes a ceiling on the total expenditures of a candidate, it necessarily places an unconstitutional limitation on the candidate's personal expenditures on his own behalf from his own funds. The Court in *Buckley* observed that

[t]he candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates.

* * *

The primary governmental interest served by the Act—the prevention of actual and apparent corruption of the political process—does not support the limitation on the candidate's expenditures of his own personal funds * * *. Indeed, the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limitations are directed. *Buckley v. Valeo*, 424 U.S. 1, 52-53 (1976).

For these reasons, the limitations in the Minnesota Act on a candidate's personal expenditures are unconstitutional. In addition, the Act imposes limitations on overall cam-

paign expenditures by candidates seeking nomination and election to state office regardless of whether they have agreed to limit their expenditures as a condition of accepting state funds. Minn. Stat. §§10A.25(2), (3) (6). The *Buckley* Court held that Congress could not impose an absolute limitation on overall campaign expenditures, *Buckley v. Valeo*, *supra*, 54-58, but could condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations, *id.* at 57 n. 165. Although sections 10A.32(3) and 10A.31(6) of the Minnesota Act condition acceptance of public funds on an agreement by the candidate that authorized expenditures on his behalf will not exceed the expenditure limits as set forth in section 10A.25, the expenditure limitations of section 10A.25 apply regardless of whether the candidate chooses to accept public funds. Thus this aspect of section 10A.25 of the Minnesota Act is unconstitutional under *Buckley* as violative of the First Amendment right to freedom of speech.

In the opinion of the court, sections 10A.27(2), (3), (4), 10A.28, and 10A.32(1), (3) are so essentially and inseparably connected with sections 10A.25 and 10A.27 (1) that the legislature would not have enacted the former without the latter provisions. Accordingly, judgment shall be entered declaring the following provisions of the Minnesota Ethics in Government Act unconstitutional and enjoining defendants from enforcing and carrying out the same: Minn. Stat. §§ 10A.17(2); 10A.25; 10A.27; 10A.28; 10A.32(1), (3); and in addition 10A.17(6), 10A.29 and 10A.34 as applied to the first enumerated sections.

We have also found the method of distribution of public campaign funds to legislative candidates as required by

section 10A.31(5)(f) to be unconstitutional. We therefore enjoin the distribution of funds from the party accounts of the state elections campaign fund to candidates for state senate and state house of representatives under section 10A.31(5)(f) and enjoin the enforcement of section 10A.34 as applied to that section. We further direct that unless a method for the distribution of public campaign funds to legislative candidates based on taxpayer preference within legislative districts or another constitutional method for distribution is enacted by March 1, 1978, all money then credited to the party accounts of the state elections campaign fund for distribution to legislative candidates and any money so credited thereafter shall revert to that fund to which it would have been credited in the absence of this legislation. Reversion shall continue until such time as a constitutionally permissible method of distribution has been enacted.³⁴

As previously noted, the Minnesota Ethics in Government Act was passed before the Supreme Court addressed the issues of governmental regulation of election campaigns and public campaign financing. The Minnesota legislature will now have the benefit of the Supreme Court's guidance in *Buckley* together with the opinion of this court when it again addresses the issue of campaign regulation and public financing of political campaigns in Minnesota.

Upon the foregoing,

IT IS ORDERED That the clerk enter judgment de-

³⁴Under section 10A.31(5), the amount to be distributed to legislative candidates in calendar year 1978 and thereafter would be 70 percent of the money credited to each party account.

claring the following provisions of the Minnesota Ethics in Government Act unconstitutional and enjoining defendants from enforcing the same: Minn. Stat. §§10A.17(2); 10A.25; 10A.27; 10A.28; 10A.31(5)(f); 10A.32(1), (3); and in addition 10A.17(6); 10A.29; and 10A.34 as applied to the first enumerated sections.

IT IS FURTHER ORDERED That if a constitutional method for the distribution of public campaign funds from party accounts to legislative candidates has not been enacted by March 1, 1978, all money credited to the party accounts of the state elections campaign fund for distribution to legislative candidates as of that date, and all money so credited thereafter, shall revert to that fund to which it would have been credited in the absence of this legislation.

DATED: December 14, 1977.

/s/ GERALD W. HEANEY
Circuit Judge
United States Court of Appeals
/s/ EDWARD J. DEVITT
Chief Judge
United States District Court
/s/ DONALD D. ALSOP
District Judge
United States District Court

JUDGMENT

Civil Action File No. 3-76-272

This action came on for hearing before the Court, Honorable HEANEY, Circuit Judge, DEVITT, ALSOP, United States District Judges, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the provisions of the Minnesota Ethics in Government Act are unconstitutional and defendants are enjoined from enforcing the same: Minn. Stat. §§10A.17(2); 10A.25; 10A.27; 10A.28; 10A.31(5)(f); 10A.32(1), (3); and in addition 10A.17(6); 10A.29; and 10A.34 as applied to the first enumerated sections.

It is Further Ordered and Adjudged that if a constitutional method for the distribution of public campaign funds from party accounts to legislative candidates has not been enacted by March 1, 1978, all money credited to the party accounts of the state elections campaign fund for distribution to legislative candidates as of that date, and all money so credited thereafter, shall revert to that fund to which it would have been credited in the absence of this legislation.

Dated at St. Paul, Minnesota, this 14th day of December, 1977.

HARRY A. SIEBEN

Clerk of Court

By /s/ BERNADINE L. BROWN

Deputy Clerk

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

3-76 Civ. 272

Notice is hereby given that Otto T. Bang, Jr., Nancy Brataas, William G. Kirchner, Charles Berg, Gerald Knickerbocker, Ray O. Pleasant, Arne H. Carlson, Gary W. Laidig, and Selma Stenberg, plaintiffs above-named, hereby appeal to the Supreme Court of the United States from the memorandum order and judgment denying an injunction entered in this action on December 14, 1977.

This appeal is taken pursuant to 28 U.S.C. §1253.

HEAD & TRUHN

/s/ JEROME TRUHN

/s/ THOMAS V. SEIFERT

Attorneys for Plaintiffs

1601 Soo Line Building

Minneapolis, Minnesota 55402

(612) 339-1601

(Filed Feb. 10, 1978. HARRY A. SIEBEN, Clerk, By
Bernardine L. Brown, Deputy.)

APPENDIX B

U.S. Const. Amend. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. XIV, §1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*Minnesota Statutes (1976):***§10A.30 STATE ELECTIONS CAMPAIGN FUND.**

Subdivision 1. There is hereby established an account within the general fund of the state to be known as the "state elections campaign fund."

Subd. 2. Within the state elections campaign fund account there shall be maintained a separate account for the candidates of each political party and a general account.

§10A.31 DESIGNATION OF INCOME TAX PAY-

MENTS. Subdivision 1. Effective with the taxable years beginning after December 31, 1973, every individual whose income tax liability after personal credit for the taxable year is \$1 or more may designate that \$1 shall be paid into the state elections campaign fund. In the case of a joint return of husband and wife having an income tax liability of \$2 or more, each spouse may designate that \$1 shall be paid.

Subd. 2. The taxpayer may designate that the \$1 be paid into the account of a political party or into the general account.

Subd. 3. The commissioner of the department of revenue shall on the first page of the income tax form notify the taxpayer of his right to allocate \$1 of his taxes (\$2 if filing a joint return) to finance the election campaigns of state candidates. The form shall also contain language prepared by the commissioner which permits the taxpayer to direct the state to allocate the \$1 (or \$2 if filing a joint return) to: (i) one of the major political parties; (ii) any minor political party which qualifies under the provisions of subdivision 3a; or (iii) all qualifying candidates as provided by subdivision 7.

Subd. 3a. A minor political party qualifies for inclusion on the income tax form as provided in subdivision 3 if a candidate of that party filed for an office in the preceding general election, or if a petition on behalf of that party is filed as provided in section 10A.01, subdivision 13, by June 1 of the taxable year.

Subd. 4. All moneys designated by individual taxpayers for the state elections campaign fund shall be credited

to the appropriate account in the general fund of the State and shall be annually appropriated for distribution as set forth in subdivisions 5, 6 and 7.

Subd. 5. In each calendar year the moneys in each party account and the general account shall be allocated to candidates as follows:

(a) 16 percent for the offices of governor and lieutenant governor jointly;

(b) 9.6 percent for the office of attorney general;

(c) 4.8 percent each for the offices of secretary of state, state auditor and state treasurer;

(d) in each calendar year during the period in which state senators serve a four year term, 20 percent for the office of state senator and 40 percent for the office of state representative;

(e) in each calendar year during the period in which state senators serve a two year term, and in 1975 and 1976, 30 percent each for the offices of state senator and state representative;

(f) all candidates of one party for the state senate and state house of representatives whose names are to appear on the ballot in the general election shall share equally in the funds allocated to their respective offices from their party account.

Moneys from any party account refused by any candidate shall be distributed to all other candidates of that party in proportion to their shares as provided in this subdivision. Moneys from the general account refused by any candidate shall be distributed to all other qualifying

candidates in proportion to their shares as provided in this subdivision.

Beginning with calendar year 1977 and applying to taxable year 1976, the allocations from the state elections campaign fund shall be: 21 percent for the offices of governor and lieutenant governor filing jointly; 3.6 percent for the office of attorney general; 1.8 percent each for the offices of secretary of state, state auditor, and state treasurer; in each calendar year during the period in which state senators serve a four year term, 23 1/3 percent for the office of state senator and 46 2/3 percent for the office of state representative; and in each calendar year during the period in which state senators serve a two year term, 35 percent each for the offices of state senator and state representative.

Subd. 6. Within two weeks after certification by the state canvassing board of the results of the primary, the state treasurer shall distribute the available funds in each party account, as certified by the commissioner of revenue on September 15, to the candidates of that party who have signed the agreement as provided in section 10A.32, subdivision 3, and whose names are to appear on the ballot in the general election, according to the allocations set forth in subdivision 5. If there is no candidate of a party for any one office designated in subdivision 5 in any year in which that office appears on the ballot, the allocation for that office shall be distributed to all other candidates of that party in proportion to their shares as set forth in subdivision 5.

Subd. 7. Within two weeks after certification by the state canvassing board of the results of the general election,

the state treasurer shall distribute the available funds in the general account, as certified by the commissioner of revenue on November 15 and according to allocations set forth in subdivision 5, in equal amounts to all candidates for each statewide office who received at least five percent of the votes cast in the general election for that office, and to all candidates for legislative office who received at least ten percent of the votes cast in the general election for the specific office for which they were candidates.

Subd. 8. Within one week after certification by the state canvassing board of the results of the primary, the board shall certify to the state treasurer the name of each candidate who has signed the agreement as provided in section 10A.32, subdivision 3, and the amount he is to receive from the available funds in his party account.

Subd. 9. Within one week after certification by the state canvassing board of the results of the general election, the board shall certify to the state treasurer the name of each candidate who is qualified to receive funds from the general account, together with the amount he is to receive from the available funds in the general account.

Subd. 10. In the event that on November 15 less than 98 percent of the tax returns have been processed, the commissioner of revenue shall certify to the board on December 7 the amount accumulated in each account since the previous certification. Within one week thereafter, the board shall certify to the state treasurer the amount to be distributed to each candidate according to the allocations as provided in subdivision 5. As soon as practicable thereafter, the state treasurer shall distribute the amounts to the candidates. Any moneys accumulated after the final certification shall be maintained

in the respective accounts for distribution in the next general election year.

§10A.32 LIMITATIONS UPON THE STATE ELECTION CAMPAIGN FUND. Subdivision 1. No candidate shall be entitled to receive from the state elections campaign fund an amount greater than the total amount of expenditures which may be made by him or on his behalf under sections 10A.25 and 10A.27. The amount by which the allocation exceeds the expenditure limit shall be distributed to all other candidates of the same party whose shares do not exceed their expenditure limits in proportion to their shares as set forth in section 10A.31.

Subd. 2. No candidate shall be entitled to receive from the state election campaign fund an amount greater than the total amount actually expended by him or on his behalf in the year of the election. If the report required to be filed on or before January 31, in the year following the general election indicates that the amount received by the candidate is greater than the amount authorized to be expended on his behalf, the treasurer of his principal campaign committee shall refund to the state treasurer an amount equal to the difference. The refund in the form of a check or money order shall be submitted with such report and the board shall forward the refund to the state treasurer for deposit in the general fund of the state.

Subd. 3. As a condition of receiving any funds from the state elections campaign fund, any candidate, prior to receipt of the funds, shall agree by stating in writing to the board on or before September 1 that authorized expendi-

tures on his behalf shall not exceed the expenditure limits as set forth in section 10A.25 and that his principal campaign committee shall not accept contributions for the period beginning with January 1 of the election year or the registration of his principal campaign committee, whichever occurs later, and ending December 31 of the election year which exceed 105 percent of the difference between the amount which may legally be expended by him or on his behalf, and the amount which he receives from the state elections campaign fund. Any amount by which his total contributions exceed 105 percent of the difference shall be refunded to the state treasurer. The refund in the form of a check or money order shall be submitted in the same manner as provided in subdivision 2.

For the purposes of this subdivision only, the total amount to be distributed to each candidate is calculated to be his share of the total estimated funds in his party account as provided in subdivision 3a, plus the total amount estimated as provided in subdivision 3a to be in the general account and set aside for that office divided by the number of candidates whose names are to appear on the general election ballot for that office. If the amount actually received by the candidate is greater by reason of a lesser number of qualifying candidates sharing in the funds in each account, and his contributions thereby exceed 105 percent of the difference, the agreement shall not be considered violated.

Subd. 3a. The commissioner of revenue shall certify to the board on or before the last day for filing for office his estimate of the total to be accumulated in each ac-

count in the state elections campaign fund after 100 percent of the tax returns have been processed. Within seven days after the last day for filing for office the secretary of state shall certify to the board the name, address, office sought, and party affiliation of each candidate who has filed with that office his affidavit of candidacy or petition to appear on the ballot. The auditor of each county shall certify to the board the same information for each candidate who has filed with that county his affidavit of candidacy or petition to appear on the ballot. Within seven days thereafter the board shall estimate the minimum amount to be received by each candidate who qualifies as provided in section 10A.31, subdivisions 6 and 7, and notify all candidates on or before August 15 of the applicable amount.

Subd. 4. If a political party for whose candidates funds have been accumulated in the state elections campaign fund does not have a candidate for any office, the moneys shall be maintained in that account until the year of the next general election. If in two successive general election years that political party does not have a candidate for any office, the accumulated funds shall be transferred to the general fund of the state.

10A.33 APPLICATION. The provisions of sections 10A.30 to 10A.32 shall apply only in general elections and primary elections preceding general elections and shall not include special elections, special primary elections, conventions and caucuses of a political party.

Laws 1978, Chapter 463:

Sec. 86. Minnesota Statutes 1976, Section 10A.30, Subdivision 1 is amended to read:

10A.30 [STATE ELECTIONS CAMPAIGN FUND]. Subdivision 1. There is hereby established an account within the special revenue fund of the state to be known as the "state elections campaign fund".

Sec. 87. Minnesota Statutes 1976, Section 10A.31, Subdivision 1, is amended to read:

10A.31 [DESIGNATION OF INCOME TAX PAYMENTS]. Subdivision 1. Effective with the taxable years beginning after December 31, 1977, every individual who files a tax return or a renter and homeowner property tax refund return with the commissioner of revenue may designate that \$1 shall be paid from the general fund of the state into the state elections campaign fund. If a husband and wife file a joint return, each spouse may designate that \$1 shall be paid. An individual who is 18 years of age or older, who is a resident of Minnesota, and who is a dependent of another individual who files a tax return or a renter and homeowner property tax refund return, may designate that \$1 shall be paid from the general fund of the state into the state elections campaign fund. No individual shall be allowed to designate \$1 more than once in any year.

Sec. 88. Minnesota Statutes 1976, Section 10A.31, Subdivision 3, is amended to read:

Subd. 3. The commissioner of the department of revenue shall on the first page of the income tax form and the renter and homeowner property tax refund return notify the filing individual and any adult dependent of that individual of his right to allocate \$1 (\$2 if filing a joint return) from the general fund of the state to finance the election campaigns of state candidates. The

form shall also contain language prepared by the commissioner which permits the individual to direct the state to allocate the \$1 (or \$2 if filing a joint return) to: (i) one of the major political parties; (ii) any minor political party as defined in section 10A.01, subdivision 13, which qualifies under the provisions of subdivision 3a; or (iii) all qualifying candidates as provided by subdivision 7. The dependent on the tax return or the renter and homeowner property tax refund return shall sign a statement which authorizes the designation of \$1. The renter and homeowner property tax refund return shall include instructions that the individual filing the return may designate \$1 on the return only if he has not designated \$1 on the income tax return.

Sec. 89. Minnesota Statutes 1976, Section 10A.31, Subdivision 3a, is amended to read:

Subd. 3a. A minor political party as defined in section 10A.01, subdivision 13 qualifies for inclusion on the income tax form as provided in subdivision 3, provided that if a petition is filed, it is filed by June 1 of the taxable year.

Sec. 90. Minnesota Statutes 1976, Section 10A.31, Subdivision 4, is amended to read:

Subd. 4. The amounts designated by individuals for the state elections campaign fund are appropriated from the general fund and shall be credited to the appropriate account in the state elections campaign fund and annually appropriated for distribution as set forth in subdivisions 5, 6, and 7.

Sec. 91. Minnesota Statutes 1976, Section 10A.31, Subdivision 5, is amended to read:

Subd. 5. In each calendar year the moneys in each party account and the general account shall be allocated to candidates as follows:

(a) 21 percent for the offices of governor and lieutenant governor together;

(b) 3.6 percent for the office of attorney general;

(c) 1.8 percent each for the offices of secretary of state, state auditor and state treasurer;

(d) In each calendar year during the period in which state senators serve a four year term, 23 1/3 percent for the office of state senator and 46 2/3 percent for the office of state representative;

(e) In each calendar year during the period in which state senators serve a two year term, 35 percent each for the offices of state senator and state representative;

(f) To assure that moneys will be returned to the counties from which they were collected, and to assure that the distribution of those moneys rationally relates to the support for particular parties or for particular candidates within legislative districts, moneys from the party accounts for legislative candidates shall be distributed as follows:

Each candidate for the state senate and state house of representatives whose name is to appear on the ballot in the general election shall receive moneys from his party account set aside for candidates of the state senate or

state house of representatives, whichever applies, according to the following formula;

For each county within his district the candidate's share of the dollars allocated in that county to his party account and set aside for that office shall be:

(a) The sum of the votes cast in the last general election in that part of the county in his district for all candidates of his party (i) whose names appeared on the ballot in each voting precinct of the state and (ii) for the state senate and state house of representatives, divided by

(b) The sum of the votes cast in that county in the last general election for all candidates of his party (i) whose names appeared on the ballot in each voting precinct in the state and (ii) for the state senate and state house of representatives, multiplied by

(c) The amount in his party account allocated in that county and set aside for the candidates for the office for which he is a candidate.

The sum of all the county shares calculated in the formula above is the candidate's share of his party account.

In a year in which an election for the state senate occurs, with respect to votes for candidates for the state senate only, "last general election" means the last general election in which an election for the state senate occurred.

For any party under whose name no candidate's name appeared on the ballot in each voting precinct in the state in the last general election, "last general election" means the last general election in which the name of a candidate of that party appeared on the ballot in each voting precinct in the state.

If in a district there was no candidate of a party for the state senate or state house of representatives in the last general election, or if a candidate for the state senate or state house of representatives was unopposed, the vote for that office for that party shall be the average vote of all the remaining candidates of that party in each county of that district whose votes are included in the sums in clauses (a) and (b). The average vote shall be added to the sums in clauses (a) and (b) before the calculation is made for all districts in the county.

Moneys from any party account not distributed in any election year shall be returned to the general fund of the state. Moneys from the general account refused by any candidate shall be distributed to all other qualifying candidates in proportion to their shares as provided in this subdivision.

Sec. 92. Minnesota Statutes 1976, Section 10A.31, Subdivision 6, is amended to read:

Subd. 6. Within two weeks after certification by the state canvassing board of the results of the primary, the state treasurer shall distribute the available funds in each party account, as certified by the commissioner of revenue on September 15, to the candidates of that party who have signed the agreement as provided in section 10A.32, subdivision 3, and whose names are to appear on the ballot in the general election, according to the allocations set forth in subdivision 5.

Sec. 93. Minnesota Statutes 1976, Section 10A.31, Subdivision 7, is amended to read:

Subd. 7. Within two weeks after certification by the

state canvassing board of the results of the general election, the state treasurer shall distribute the available funds in the general account, as certified by the commissioner of revenue on November 15 and according to allocations set forth in subdivision 5, in equal amounts to all candidates for each statewide office who received at least five percent of the votes cast in the general election for that office, and to all candidates for legislative office who received at least ten percent of the votes cast in the general election for the specific office for which they were candidates. The board shall not use the information contained in the report of the principal campaign committee of any candidate due ten days before the general election for the purpose of reducing the amount due that candidate from the general account.

Sec. 94. Minnesota Statutes 1976, Section 10A.31, Subdivision 10, is amended to read:

Subd. 10. In the event that on the date of either certification by the commissioner of revenue as provided in subdivisions 6 and 7, less than 98 percent of the tax returns have been processed, the commissioner of revenue shall certify to the board on December 7 the amount accumulated in each account since the previous certification. Within one week thereafter, the board shall certify to the state treasurer the amount to be distributed to each candidate according to the allocations as provided in subdivision 5. As soon as practicable thereafter, the state treasurer shall distribute the amounts to the candidates. Any moneys accumulated after the final certification shall be maintained in the respective accounts for distribution in the next general election year.

Sec. 95. Minnesota Statutes 1976, Section 10A.31, is amended by adding a subdivision to read:

Subd. 11. For the purposes of section 10A.31, a write-in candidate is not a candidate unless he complies with the provisions of section 10A.32, subdivision 3.

Sec. 96. Minnesota Statutes 1976, Section 10A.32, Subdivision 1, is amended to read:

10A.32. [LIMITATIONS UPON THE STATE ELECTIONS CAMPAIGN FUND.] Subdivision 1. No candidate shall be entitled to receive from the state elections campaign fund and retain an amount greater than the aggregate amount of expenditures which may be made by him and approved expenditures made on his behalf under section 10A.25, subdivision 2. The amount by which the allocation exceeds the expenditure limit shall be returned to the general fund of the state.

Sec. 97. Minnesota Statutes 1976, Section 10A.32, subdivision 2 is amended to read:

Subd. 2. No candidate shall be entitled to receive from the state elections campaign fund an amount greater than the aggregate amount of expenditures made by him and approved expenditures made on his behalf in the year of the election. If the report required to be filed on or before January 31 in the year following the general election indicates that the amount received by the candidate from the state elections campaign fund is greater than the amount expended on his behalf, the treasurer of his principal campaign committee shall return to the state treasurer an amount equal to the difference. The return in the form of a check or money order shall be submitted with

such report and the board shall forward the return to the state treasurer for deposit in the general fund of the state.

Sec. 98. Minnesota Statutes 1976, Section 10A.32, Subdivision 3, is amended to read:

Subd. 3. As a condition of receiving any moneys from the state elections campaign fund, a candidate shall agree by stating in writing to the board that (a) his expenditures and approved expenditures shall not exceed the expenditure limits as set forth in section 10A.25 and that (b) he shall not accept contributions or allow approved expenditures to be made on his behalf for the period beginning with January 1 of the election year or with the registration of his principal campaign committee, whichever occurs later, and ending December 31 of the election year, which aggregate contributions and approved expenditures exceed the difference between the amount which may legally be expended by him or on his behalf, and the amount which he receives from the state elections campaign fund. The agreement, insofar as it relates to the expenditure limits set forth in section 10A.25, remains effective until the dissolution of the principal campaign committee of the candidate or the opening of filings for the next succeeding election to the office held or sought at the time of agreement, whichever occurs first. Beginning in 1980, money in the account of the principal campaign committee of a candidate on January 1 of the election year for the office held or sought shall be considered contributions accepted by that candidate in that year for the purposes of this subdivision. Notwithstanding the effective date of this section, for 1978, the period

for determining the aggregate contribution and approved expenditure limit agreed to pursuant to this subdivision shall begin January 1, 1978. That amount of all contributions accepted by a candidate in an election year which equals the amount of noncampaign disbursements made by that candidate in that year shall not count toward the aggregate contributions and approved expenditure limit imposed by this subdivision. Any amount by which his aggregate contributions and approved expenditures agreed to under clause (b) exceed the difference shall be returned to the state treasurer in the manner provided in subdivision 2. In no case shall the amount returned exceed the amount received from the state elections campaign fund.

The candidate may submit his signed agreement to the filing officer on the day he files his affidavit of candidacy or petition to appear on the ballot, or he may submit the agreement to the board no later than September 1.

The board prior to the first day of filing for office shall forward forms for the agreement to all filing officers. The filing officer shall without delay forward signed agreements to the board. An agreement may not be rescinded after September 1.

For the purposes of this subdivision only, the total amount to be distributed to each candidate is calculated to be his share of the total estimated funds in his party account as provided in subdivision 3a, plus the total amount estimated as provided in subdivision 3a to be in the general account of the state elections campaign fund and set aside for that office divided by the number of candidates whose names are to appear on the general election ballot for that office. If for any reason the

amount actually received by the candidate is greater than his share of the estimate, and his contributions thereby exceed the difference, the agreement shall not be considered violated.

Sec. 99. Minnesota Statutes 1976, Section 10A.32, Subdivision 3a, is amended to read:

Subd. 3a. The commissioner of revenue shall, on the basis of vote totals provided by the secretary of state, calculate and certify to the board before the first day of July in an election year his estimate, after 100 percent of the tax returns have been processed, of the total amount in the general account, and the amount of moneys each candidate who qualifies as provided in section 10A.31, subdivision 6, may receive from his party account, based upon the formula set forth in section 10A.31, subdivision 3. Prior to the first day of filing for office, the board shall publish and forward to all filing officers these estimates. Within seven days after the last day for filing for office the secretary of state shall certify to the board the name, address, office sought, and party affiliation of each candidate who has filed with that office his affidavit of candidacy or petition to appear on the ballot. The auditor of each county shall certify to the board the same information for each candidate who has filed with that county his affidavit of candidacy or petition to appear on the ballot. Within seven days thereafter the board shall estimate the minimum amount to be received by each candidate who qualifies as provided in section 10A.31, subdivisions 6 and 7, and notify all candidates on or before August 15 of the applicable amount. The board shall include with the notice a form for the agreement provided in subdivision 3.

Sec. 100. Minnesota Statutes 1976, Section 10A.32, is amended by adding a subdivision to read:

Subd. 3b. As a condition of receiving a public subsidy for his election campaign in the form of tax credits against the tax due from individuals who contribute to his principal campaign committee a candidate shall agree by stating in writing to the board at any time beginning with the registration of his principal campaign committee that his expenditures and approved expenditures shall not exceed the expenditure limits as set forth in section 10A.25. The agreement shall remain effective until the dissolution of the principal campaign committee of the candidate or the opening of filing for the next succeeding election for the office held or sought at the time of agreement, whichever occurs first. An agreement signed under this subdivision may not be rescinded. The commissioner of revenue shall not allow any individual or married couple filing jointly to take a credit against any tax due, pursuant to section 290.06, subdivision 11, for any contribution to a candidate for legislative or statewide office who has not signed the agreement provided in this subdivision. Nothing in this subdivision shall be construed to limit the campaign expenditure of any candidate who does not sign an agreement under this subdivision but accepts a contribution for which the contributor claims a credit against tax due. The board shall forward a copy of any agreement signed under this subdivision to the commissioner of revenue. The board shall make available to any candidate signing an agreement a supply of Official Tax Credit Receipt Forms which state in bold face type that (a) a contributor who is given a receipt form is eligible to receive a credit against his tax

due in an amount equal to 50 percent of his contribution but not more than \$25 for an individual, or not more than [sic] \$50 for a married couple filing jointly, and (b) that the candidate to whom he has contributed has voluntarily agreed to abide by campaign expenditure limits. If a candidate does not sign an agreement under this subdivision he may not issue an Official Tax Credit Receipt form, or any facsimile thereof, to any of his contributors. Any candidate who does not voluntarily agree to abide by the expenditure limits imposed in section 10A.25 and who willfully issues Official Tax Credit Receipt forms, or any facsimile thereof, to any contributor is guilty of a misdemeanor.

Sec. 101. Minnesota Statutes 1976, Section 10A.32, Subdivision 4, is amended to read:

Subd. 4. If a political party for whose candidates funds have been accumulated in the state elections campaign fund does not have a candidate for any office, the moneys set aside for that office shall be returned to the general fund of the state.

Sec. 102. Minnesota Statutes 1976, Section 10A.33, is amended to read:

10A.33 [APPLICATION.] The provisions of sections 10A.30 to 10A.32 shall apply only in general elections and primaries preceding general elections and shall not apply to special elections or special primaries.

Sec. 103. Minnesota Statutes 1976, Chapter 10A. is amended by adding a section to read:

[10A.335] For the purpose of determining whether the distribution formula provided in section 10A.31, sub-

division 5, (a) assures that moneys will be returned to the counties from which they were collected, and (b) continues to have a rational relation to the support for particular parties or particular candidates within legislative districts, it is the intention of this section that future legislatures monitor, using statistical data provided by the department of revenue, income tax returns and renter and homeowner property tax refund returns on which \$1, or in the case of a joint return, \$2, is designated for a political party.

* * *

Laws 1978, Chapter 793:

Sec. 39. Minnesota Statutes 1976, Section 10A.32, Subdivision 3, as amended by Laws 1978, Chapter 463, Section 98, is amended to read:

Subd. 3. As a condition of receiving any moneys from the state elections campaign fund, a candidate shall agree by stating in writing to the board that (a) his expenditures and approved expenditures shall not exceed the expenditure limits as set forth in section 10A.25 and that (b) he shall not accept contributions or allow approved expenditures to be made on his behalf for the period beginning with January 1 of the election year or with the registration of his principal campaign committee, whichever occurs later, and ending December 31 of the election year, which aggregate contributions and approved expenditures exceed the difference between the amount which may legally be expended by him or on his behalf, and the amount which he receives from the state elections campaign fund. The agreement, insofar as it relates to the expenditure limits set forth in section

10A.25, remains effective until the dissolution of the principal campaign committee of the candidate or the opening of filings for the next succeeding election to the office held or sought at the time of agreement, whichever occurs first. Beginning in 1980, money in the account of the principal campaign committee of a candidate on January 1 of the election year for the office held or sought shall be considered contributions accepted by that candidate in that year for the purposes of this subdivision. Notwithstanding the effective date of this section, for 1978, the period for determining the aggregate contribution and approved expenditure limit agreed to pursuant to this subdivision shall begin January 1, 1978. That amount of all contributions accepted by a candidate in an election year which equals the amount of noncampaign disbursements made by that candidate in that year, and the amount of contributions received and approved expenditures made between January 1, 1978, and February 28, 1978 which equals the amount of expenditures made between January 1, 1978, and February 28, 1978, for goods consumed and services used before February 28, 1978, shall not count toward the aggregate contributions and approved expenditure limit imposed by this subdivision. Any amount by which his aggregate contributions and approved expenditures agreed to under clause (b) exceed the difference shall be returned to the state treasurer in the manner provided in subdivision 2. In no case shall the amount returned exceed the amount received from the state elections campaign fund.

The candidate may submit his signed agreement to the filing officer on the day he files his affidavit of candidacy or petition to appear on the ballot, or he may submit the agreement to the board no later than September 1.

The board prior to the first day of filing for office shall forward forms for the agreement to all filing officers. The filing officer shall without delay forward signed agreements to the board. An agreement may not be rescinded after September 1.

For the purposes of this subdivision only, the total amount to be distributed to each candidate is calculated to be his share of the total estimated funds in his party account as provided in subdivision 3a, plus the total amount estimated as provided in subdivision 3a to be in the general account of the state elections campaign fund and set aside for that office divided by the number of candidates whose names are to appear on the general election ballot for that office. If for any reason the amount actually received by the candidate is greater than his share of the estimate, and his contributions thereby exceed the difference, the agreement shall not be considered violated.

MAY 11 1978

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. **77-1450**

OTTO T. BANG, et al.,

Appellants,

vs.

ROGER F. NOREEN, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

MOTION TO DISMISS OR AFFIRM

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IN THE
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October Term, 1977

No. _____

OTTO T. BANG, et al.,

Appellants,

vs.

ROGER F. NOREEN, et al.,

Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA**

MOTION TO DISMISS OR AFFIRM

Appellees move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the three-judge federal district court for the District of Minnesota on the following grounds:

1. The decision of the district court is clearly correct under the principles recently enunciated by this Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) and *American Party of Texas v. White*, 415 U.S. 767 (1974).
2. There is no conflict of decision.
3. The question on which the decision of the cause rests is so insubstantial as not to need further argument.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the United States Constitution and the relevant provisions of the Minnesota Ethics in Government Act, Minn. Stat. §§ 10A.30-10A.33 (1976) as amended, are reproduced in Appendix B to Appellants' Jurisdictional Statement.

QUESTION PRESENTED

Was the lower court correct in holding that the Minnesota law providing for partial public financing of certain political campaigns by means of a party-designated income tax return check-off system does not violate the appellants' rights guaranteed under the First and Fourteenth Amendments to the United States Constitution?

STATEMENT

The Minnesota public financing law, Minn. Stat. § 10A.30-33, as amended, Minn. Laws 1978, ch. 463, Jurisdictional Statement Appendix at A-31-A-53 (hereinafter "J.S. App. at —"), provides for limited public subsidies for candidates running for state-wide office or for the legislature. The public financing system allows taxpayers and certain other groups of voting age persons to designate on their state income tax forms whether they wish to designate one dollar to the State Elections Campaign Fund and, if so, whether that dollar is to go to an earmarked party account or to the general account.

Funds in the particular party accounts are distributed by the state Treasurer to candidates of the respective parties¹ shortly after the primary elections in September of an election year. After the general election in November, the funds in the general account are distributed to all candidates who received at least 10 percent of the votes cast for the office for which they ran regardless of party affiliation or lack thereof.

Appellants are seven incumbent Independent-Republican (hereinafter "I-R") legislators who were candidates for re-election in 1976, one independent state senator running for re-election in 1976 and a private citizen. The law in effect at the time of the 1976 election provided that all members of the same political party running for the same office, e.g. state senate, received the same amount of public financing money.

¹ Appellants observe that Minnesota is the only state to distribute public money directly to the candidates instead of to the political parties. Jurisdictional Statement at 19 n. 18 (hereinafter referred to as "J.S. at —"). The Buckley Court, however, found that such a distinction between distribution systems was "immaterial." 424 U.S. at 95 n. 130.

Thus, in the 1976 elections, plaintiff Senate candidates Bang, Brataas and Kirchner each received about \$1,429 in public funding while their opponents in the Democratic-Farmer-Labor party (hereinafter "DFL") received about \$2,265. The plaintiff House candidates, Knickerbocker, Pleasant, Carlson and Laidig each received about \$721 in public funding while their DFL opponents received about \$1,138.² Plaintiff Berg was an independent candidate for the state Senate who declined to accept public financing. If he had accepted public financing and had received more than 10 percent of the votes cast for the office for which he ran, he would have received about \$591 from the general account.

In the court below, plaintiffs sought a declaration that the party designated tax check-off was unconstitutional.³ On October 12, 1976, the court issued an order, *inter alia*, denying plaintiffs' motion for a preliminary injunction restraining distribution of state monies to legislative candidates. On December 14, 1977, the court upheld the party designated tax check-off system. The court, however, ruled the legislative distribution system unconstitutional and ordered that unless a constitutional method for distribution of monies in the party accounts to legislative candidates was enacted by March 1, 1978, all monies credited to the party accounts for legislative accounts would revert to the state's general fund. The recent

² In the 1976 election, candidates for the state Senate could spend up to \$15,000 for election while candidates for state Representative could spend \$7,500. The amended law provides that only candidates receiving some form of public subsidy are bound by these expenditure limits. Minn. Laws 1978, ch. 463.

³ Plaintiffs also challenged other provisions of Minnesota law which are not at issue here.

legislative amendments were enacted on February 27, 1978.⁴

Appellants have appealed from that part of the district court decision upholding the party designated check-off. Appellees filed a notice of cross-appeal on February 13, 1978, but will dismiss their cross-appeal since the 1978 legislative amendments have rendered the cross-appeal moot.

ARGUMENT

I. THE THREE-JUDGE FEDERAL DISTRICT COURT CLEARLY APPLIED THE PROPER STANDARD OF JUDICIAL SCRUTINY TO THE PROVISIONS OF THE MINNESOTA CAMPAIGN FUNDING LAW AUTHORIZING A PARTY-DESIGNATED TAX CHECK-OFF SYSTEM.

In validating the Minnesota party designated tax check-off mechanism, the three-judge federal district court properly concluded that the Act should not be reviewed under the standard of strict judicial scrutiny but that it must be sustained if it "bear[s] some rational relationship to [a] legitimate state purpos[e]," citing *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 40 (1973). J.S. App. at A-9. Relying on this Court's ruling in *Buckley v. Valeo*, 424 U.S.

⁴ The district court had ruled the prior distribution system of funds to legislative candidates unconstitutional because "the aggregate political party preferences expressed by all the state taxpayers in Minnesota have no rational relation to the support for particular candidates within legislative districts." J.S. App. at A-19. The new law, Minn. Laws 1978, ch. 463, § 91, J.S. App. at A-41-43, promulgated pursuant to the court's order keys the amount of public financing received by a candidate from his party account to the political support a candidate's party enjoys within a particular legislative district. This new distribution system has not been passed upon by any court. The fundamental concept of the party designated tax check-off has not been altered by the 1978 legislation.

1 (1976), the lower court held that the Minnesota Act was constitutional if it "furthers 'sufficiently important governmental interests and has not unfairly or unnecessarily burdened the political opportunity of any party or candidate.'" J.S. App. at A-9. Application of this less exacting standard is appropriate since, as the court found, "the public financing provisions of the Act do not impinge upon the First Amendment rights of political candidates" J.S. App. at A-9.

Significantly, however, the test applied by the court was more exacting than traditional "minimum rationality." The court identified the "important" or "vital" governmental interests sought to be furthered by the Act, and decided that the means chosen to further these interests were within a range of choices reasonably calculated to advance these interests. See J.S. App. at A-9 through A-14.

Appellants contend that the Minnesota Act denies a candidate benefits because of his choice of political association and, hence, must be subjected to strict judicial scrutiny. J.S. at 11-12. In support of this position, appellants rely on the rulings enunciated by this Court in the "compelled disclosure" cases. *E.g.*, *Gibson v. Florida Legislative Comm.*, 372 U.S. 539 (1963); *NAACP v. Button*, 371 U.S. 415 (1963). These cases subjected to strict judicial scrutiny state laws compelling organizations to release the names of their members to various public bodies. These cases were cited by this Court in *Buckley* in its analysis of the disclosure requirements of the Federal Act, 2 U.S.C. §§ 431, *et seq.*, which were held to be justified by sufficiently important governmental interests. See *Buckley v. Valeo*, *supra* at 64. The "compelled disclosure" cases formed no part of this Court's analysis of the Presidential Election Campaign Fund.

In its equal protection analysis of the federal campaign financing scheme in *Buckley*, however, this Court compared that scheme with the ballot-access regulations examined in prior cases. See *id.* at 93-96. This court noted that

the denial of public financing to some Presidential candidates is not restrictive of voters' rights and less restrictive of candidates'. [The Federal Campaign Financing Law] does not prevent any candidate from getting on the ballot or any voter from casting a vote for the candidate of his choice; the inability, if any, of minor-party candidates to wage effective campaigns will derive not from lack of public funding but from their inability to raise private contributions.

* * *

Accordingly, we conclude that public financing is generally less restrictive of access to the electoral process than the ballot-access regulations dealt with in prior cases.

Id. at 94-95 (footnotes omitted). *Buckley* further observed that the federal public financing law "furthers, not abridges, pertinent First Amendment values." *Id.* at 93. Accordingly, this Court concluded that strict judicial scrutiny was not the appropriate standard by which to review the federal campaign financing law.

The Minnesota public financing system does not itself establish unequal public funding, but merely permits funding based upon expressed public support for particular parties. It does not enshrine any party into a "permanently preferred position." *Id.* at 94. It does not invidiously benefit incumbents as a class nor does it invidiously discriminate against any other class. There is nothing in the Minnesota act which in any way gives preferential treatment to any political party; the act is

politically blind. Indeed, the district court specifically noted that the plaintiffs had failed to demonstrate that the Minnesota Act would "unfairly or unnecessarily burden the political opportunity of minority party candidates." J.S. App. at A-12.⁵

Strict judicial scrutiny is therefore inappropriate and the court below properly applied the standard enunciated in *Buckley*. The appellees respectfully suggest that it is unnecessary for this Court to further refine the *Buckley* standard because it was clearly articulated and thoroughly discussed by the lower court.

II. MINNESOTA'S PARTY DESIGNATED TAX CHECK-OFF IS CONSTITUTIONAL UNDER *BUCKLEY v. VALEO* AND *AMERICAN PARTY OF TEXAS v. WHITE*.

The district court ruled the Minnesota party designated tax check-off system constitutional relying on *Buckley* and observing that "[i]t is clear that a party's or candidate's demonstrated public support may properly be considered in the distribution of public campaign funds." J.S. App. at A-13. The court further observed that the Minnesota system is preferable to other public financing systems since the taxpayer designation "minimizes state involvement in the distribution deci-

⁵ In their Jurisdictional Statement appellants assert that

It is clear from the record in this case that the inferior funding of I-R and independent candidates places them at a substantial disadvantage in their election contests. Testimony to that effect went un rebutted.

J.S. at 15.

This assertion, however, is contrary to the explicit finding of the district court quoted above. J.S. App. at A-12. Furthermore, there was no testimony in this case. Appellants are presumably referring to appellant Kirchner's deposition where he opined a disadvantage from the funding differences.

sion." J.S. App. at A-14. In *Buckley v. Valeo*, *supra*, and *American Party of Texas v. White*, 415 U.S. 767 (1974), this Court has upheld the basic tenet of the Minnesota Act—that public financing may be based on demonstrated public support.

A. Language In *Buckley* Strongly Suggests That This Court Viewed The Designated Check-off As A Constitutional Means Of Public Financing.

In *Buckley*, the plaintiffs therein argued *inter alia*, that the federal check-off provision was invalid because it failed to do precisely what the Minnesota Act does, i.e. provide the voter with some choice as to which party or candidate shall receive his checked-off dollar. 424 U.S. at 91-92. See also, *Amicus Curiae* Brief of Senator Metcalf, *Buckley v. Valeo*. This Court upheld the federal check-off provision against this challenge but observed that:

Some proposals for public financing would give taxpayers the opportunity to designate the candidate or party to receive the dollar, and § 6096 initially offered this choice. . . . The voucher system proposed by Senator Metcalf, as amicus curiae here, also allows taxpayers this option. But Congress need not provide a mechanism for allowing taxpayers to designate the means in which their particular tax dollars are spent. . . . Further, insofar as these proposals are offered as less restrictive means, Congress had legitimate reasons for rejecting both. The designation option was criticized on privacy grounds, 119 Cong.Rec. 22598, 22396 (1973), and also because the identity of all candidates would not be known by April 15, the filing day for annual individual and joint tax returns. . . .

424 U.S. at 92 n. 125 (emphasis added). Thus, while this Court ruled that the Congress "need not" allow for voter designation of a checked-off dollar, this Court clearly implied that such a system would be a constitutionally "less restrictive" mechanism.

The District of Columbia Circuit Court of Appeals in *Buckley*, 519 F.2d 821 (D.C. Cir. 1975) was even more explicit in stating that designated check-off plans are constitutional.

The objection [of the plaintiffs] seems to be that the voluntary checkoff is not sufficiently voluntary, that the taxpayer must have the freedom to designate which party or candidate will receive his checked-off dollar.

It is true that some plans for public financing, such as the "voucher" system suggested by Senator Metcalf . . . do allow the taxpayer this choice. *We assume that Congress might well have adopted that system, without constitutional objection, but we cannot say that the Constitution requires that the taxpayer have such an option.* If it is established that the Congress has power under article I, section 8, clause 1, to expend money to fund candidate campaigns, then surely Congress could do so simply by appropriating the sums to the Presidential Election Campaign Fund without giving individual taxpayers any control at all. *A fortiori Congress can establish a system which gives the taxpayer some choice—* in affecting the total amount of public funds to be distributed on the Congressional formula—without going all the way to permit each taxpayer complete authority over the disposition of his dollar of tax obligation. If the taxpayer wants to avoid any conception that some part of "his" tax money will benefit candidates he does not favor, then he can simply refrain from checking off his dollar for the Fund.

Id. at 880 (emphasis added).

B. In Upholding The Federal Act's Presidential Primary Matching System, Buckley Validated The Major Underpinning Of The Minnesota Designated Check-off.

The Presidential Primary Matching Payment Account under the Federal Act is intended to aid campaigns by presidential candidates in primary elections. 18 U.S.C. § 9031, *et seq.* The threshold eligibility requirement is that the candidate must raise at least \$5,000 in each of 20 states.⁶ Federal funding is then provided according to a matching formula whereby each qualifying candidate receives public funds equal to the total private contributions received disregarding contributions from any person to the extent they exceed \$250. In sustaining the Presidential Primary Matching Payment Account, this Court in *Buckley* upheld the concept of appropriating funds to a candidate or party based on demonstrated public support. Thus, this Court upheld the basic principle underlying the Minnesota designated check-off.

Indeed, the thrust of the Minnesota check-off system is substantially fairer than the "matching" concept of the federal law. Under the federal law, a relatively small number of people contributing up to \$250 each control the amount of matching funds which a candidate may receive.⁷ This small group of people thus enjoys double influence since the candidate receives their contributions plus the matching funds based on those contributions. In contrast, the Minnesota system allocates funds based upon the one dollar designations made by hundreds of thousands of individual taxpayers and certain other voting age citizens.

⁶ Only the first \$250 from each person contributing to the candidate may be counted.

⁷ If as few as 20 people in each of 20 states contributed \$250 to a particular candidate, they could qualify him for matching public funds. (20 x \$250 = \$5,000).

**C. Other Cases Have Also Upheld The Principle Enun-
ciated In Buckley Of Matching The Amount Of Public
Financing To The Degree Of Public Support Enjoyed
By A Party Or Candidate.**

In *American Party of Texas v. White*, 415 U.S. 767 (1974), several minor parties sought positions for a slate of candidates on the general election ballot. Under Texas law, minor parties could achieve ballot positions only through party conventions or a petition process, while the major parties used the primary system. Texas provided for public financing from state revenues for primary elections only for those political parties receiving 200,000 or more votes for governor in the last preceding general election. The law precluded public funding to reimburse minor political parties for their costs in obtaining ballot positions. This Court upheld this method of public financing noting in part that the Texas system did not have "a real and appreciable impact on the exercise of the franchise." 415 U.S. at 794.

In *American Party of Idaho v. Axdrus*, Civil No. 1-76-148 (D. Idaho 1976), appeal dismissed 430 U.S. 912 (1977), a three-judge federal panel upheld the Idaho public financing law. The Idaho law is analogous to the Minnesota Act in that it allows taxpayers to designate \$1 on their state tax return to either a specific party or to an undesignated fund. Each party receives the funds in the earmarked account while payments from the undesignated fund are distributed to all parties in proportion to the share of votes cast for its gubernatorial candidate in the last election. *Idaho Code* § 63-3088 (1975).

In rejecting the American Party's contention that the mode of payment of the funds in the undesignated fund denied it

equal protection, the court stated that *Buckley* and *American Party of Texas v. White*, *supra*, were dispositive. On March 7, 1977, this Court dismissed the appeal "for want of jurisdiction." *American Party of Idaho v. Evans*, 430 U.S. 912 (1977).⁶

**D. Through Credits And Deductions The State And Fed-
eral Tax Laws Provide A Method Of Public Financing
Directly Analogous To The Minnesota Public Financing
Law.**

The Minnesota legislature and the United States Congress have both used their respective taxing powers for the partial underwriting of political parties and political candidates by providing for, in addition to the direct public financing tax check-offs, tax credits or deductions. See Minn. Stat. §§ 290.06 (11), 290.21 (1976); 26 U.S.C. §§ 41(b), 218(b). When an individual who has contributed to a political campaign or candidate receives a credit or deduction that reduces his income tax liability, the Government in effect makes part of the contribution through its loss of tax revenue. These tax incentives "permit the realities of the campaign . . . to be reflected through the separate decisions of millions of taxpayers. . . ." Rosenthal, *Campaign Financing and the Constitution*, 9 Harv. J. of Legis. 359, 418 (1972). The district court properly observed that such tax credits and tax deductions are "directly analogous" to Minnesota's party-designated tax check-off. J.S. App. at 14.

⁶ The issue of keying the distribution of public funds to candidates or parties based on demonstrated public support was presented to the Court in that case. Motion to Dismiss Or Affirm at 17-21, *American Party of Idaho v. Evans*, 430 U.S. 912 (1977).

It is, of course, highly improbable that this loss of state tax revenue would be distributed equally between the I-R and DFL. See district court opinion, J.S. App. at A-14. Indeed, it is likely that to the extent the deductions are most beneficial to higher income persons or that tax credits may be used by those most able to afford political contributions, one party might receive considerably more benefit than the other from these tax incentives. Nevertheless, this disparity in no way operates to invalidate these tax provisions. This use of the taxing power is generally recognized not to "give rise to serious constitutional difficulties." 9 Harv. J. of Legis., *supra* at 411.

E. Appellants' Constitutional Arguments Are Specious.

Rather than confronting the *Buckley* rationale, appellants assert that the Minnesota Act affects their "right of political association" and "right to vote" because, in the 1976 election, each DFL candidate received several hundred dollars more from the DFL party account than each I-R candidate received from the I-R party account. J.S. at 10-16.

The Supreme Court has never held that all individuals or groups must be treated precisely the same. See *Jenness v. Fortson*, 403 U.S. 431 (1971); *Norvell v. Illinois*, 373 U.S. 420 (1963). As the *Jenness* court noted, "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike. . . ." 403 U.S. at 442.

If the appellants' suggested alternative of precisely equal public funding to all major party candidates regardless of popular support (J.S. at 24) were effectuated, it would be necessary to bar voters from registering their choices through a designated check-off. Under such a system, it would be the government rather than the citizen that would determine the

amount of money each candidate would receive. Obviously, the rights of individual voters are impinged upon less by having the citizenry determine, to the extent feasible, the amount which each party or candidate will receive. See district court opinion, J.S. App. at A-16-A-17 & n. 29. Furthermore, such a system might operate to unfairly subsidize a party which does not enjoy equal strength with another party and force voters in a majority party to subsidize a non-majority party. Although this alternative may be constitutionally adequate, as may other means of public financing, it is certainly not a less restrictive alternative.

Appellants' analogy to the ballot access cases (J.S. at 13-16) is also misplaced for two reasons. First, the Minnesota Act does not impede access to the ballot; indeed, as the *Buckley* Court found, public financing furthers First Amendment rights. *Buckley v. Valeo*, *supra* at 93. Second, contrary to appellants' assertion that "[f]actual proof of discriminatory effect upon major-party candidates is present here," J.S. at 18, the district court expressly found that plaintiffs had not adequately

demonstrated that the Act's public financing provisions will unfairly or unnecessarily burden the political opportunity of minority party candidates. The mere fact that, in a given year, IR candidates received less public money from their party account than did DFL candidates provides no basis for predicting that the Act will invariably and invidiously benefit the majority party.

J.S. App. at A-12.⁹ Significantly, notwithstanding appellants' professed fears of a "substantial disadvantage in their elec-

⁹ See n. 5 *supra*.

tion contests . . ." (J.S. at 15), all seven I-R appellants in the instant case were re-elected in the 1976 elections. 1977-78 Minnesota Legislative Manual, pp. 63-5.

III. APPELLANTS' CONTENTIONS CONCERNING INDEPENDENTS AND USE OF THE INCOME TAX SYSTEM ARE MERITLESS.

Appellant Berg's contentions concerning independents are without merit. First, Berg, like Eugene McCarthy in *Buckley*, chose not to accept public financing. Thus, he does not present a justiciable case or controversy. 424 U.S. at 87 n. 118. Second, the Minnesota law allows independents to receive substantial public funding if they receive more than 10 percent of the vote in the general election for the office for which they are running. Minn. Stat. § 10A.31, subd. 7. Appellants apparently contend that Berg, as an independent, should receive precisely as much money as candidates who are affiliated with the I-R or DFL parties. Such a system, however, would be unfair to major party candidates since they must run in primary elections as well as general elections. As an independent, Berg was not required to run in the primary elections and did not even have his name on the primary ballot. Indeed, the *Buckley* decision speaks only of "general election funding." 424 U.S. at 87 n. 118.

The Supreme Court in *Buckley* emphasized that "the Constitution does not require Congress to treat all declared candidates the same for public financing purposes." 424 U.S. at 97. Minnesota's provision relating to independents is eminently fair. It grants serious independents significant public financing but makes reasonable distinctions between candidates who must run in both the primary and general elections and those who need run only in the general election.

Appellants also allege that Minnesota's use of the tax system is improper since it does not precisely mirror the electorate. Although this system was upheld by the lower court, the 1978 session of the legislature amended this section of the law to further broaden the persons entitled to designate one dollar to the State Elections Campaign Fund. Under the new law, in addition to taxpayers, persons who file renter or homeowner property tax refund requests or an adult dependent of such a filer or of a taxpayer may also designate one dollar to the State Elections Campaign Fund. Minn. Laws 1978 ch. 463, §§ 87-88. J.S. App. at A-39. Appellants' assertion that this amended law "persists in denying participation to all eligible voters and continues to permit non-voter taxpayers to participate," J.S. at 15, is meaningless since this new provision has not been challenged or passed upon by the district court. In any event, the prior provision, which was upheld by the district court herein, was the same as the federal check-off system which was implicitly validated in *Buckley*. 424 U.S. at 85-108.

CONCLUSION

The district court properly applied the principles enunciated in decisions of this Court. Since the district court opinion is not in conflict with decisions of this Court or of any other court, the appeal herein should be dismissed or the decision of the district court should be summarily affirmed.

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